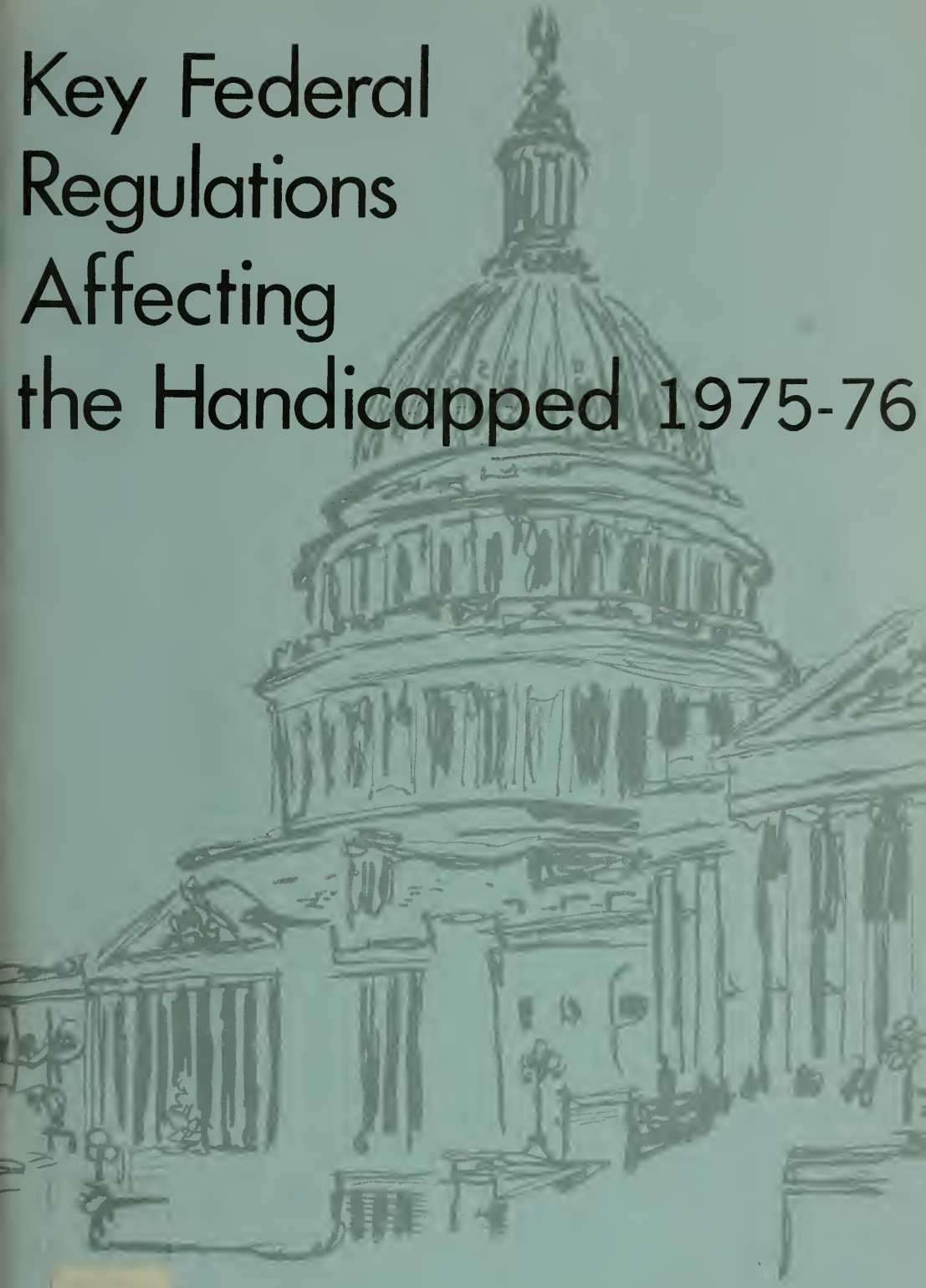
Key Federal Regulations Affecting the Handicapped 1975-76



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Key Federal Regulations Affecting the Handicapped 1975-76

U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
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INTRODUCTION

As the number, size and complexity of federal programs have grown in recent years, the regulatory process has had an increasingly important influence on shaping national policies. Despite recent efforts by Congress to limit the powers of administrative agencies and expand its own legislative oversight activities, the impact of federal regulations on the lives of handicapped Americans continues to grow.

Over 117,000 pages of regulations, policies and notices appeared in the *Federal Register* during calendar years 1975 and 1976. Practically every daily issue of the *Register* contained one or more sets of regulations or administrative policies with implications for some of the estimated 45 million handicapped Americans. Under the circumstances, it is impossible, in this brief summary, to review the literally hundreds of administrative actions affecting the handicapped taken by federal agencies last year. Therefore, only the most salient regulations, with the broadest implications for handicapped children and adults, have been selected for review. Even for this handpicked sample, we have been forced to highlight only the most important features due to the length, complexity and highly technical nature of many of these rules.

The promulgation and revision of federal regulations and policies is a continuous process. For this reason, readers should be cognizant of the fact that this report covers only regulations issued between January 1 and December 31, 1976. However, where we were aware of significant revisions issued during the early months of 1977, this information is footnoted.

Exact citations to the *Code of Federal Regulations* also have been included for the convenience of readers who are interested in pursuing any of these regulations further. Most good libraries maintain a current compilation of the *Code.* In addition, the responsible administrative agency generally will make reprints available to interested citizens upon request.

In several instances, regulations were promulgated and revised later in the course of the year. Therefore, in order to give the reader a better perspective on the course of events, the summary has been divided by program area rather than chronologically.

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HEALTH

1. Long Term Care

Since Title XVIII (Medicare) and Title XIX (Medicaid) were added to the Social Security Act in 1965, reimbursements under these two giant federal health programs have gradually become a major source of support for care of the mentally ill and mentally retarded in public and private institutions, nursing homes and intermediate care facilities. Today the states receive well over $1 billion annually in federal Medicaid reimbursements on behalf of eligible residents in public mental hospitals and institutions for the mentally retarded alone. While reliable estimates are not available, it is safe to assume that federal outlays under Titles XVIII and XIX for mentally ill and mentally retarded persons in privately operated long term care facilities are also considerable.

During 1975 and 1976, a variety of Medicare and Medicaid regulations were issued or amended. The following rules, however, promise to have the most far-reaching impact on services to handicapped individuals.

Rights of ICF-MR Residents. On March 4, 1975, the Department of Health, Education, and Welfare issued proposed regulations enumerating the rights of residents in intermediate care facilities which participate in the Medicaid program (40 CFR 8956). The new rules, designed to promote the physical and emotional well-being of ICF residents, closely paralleled the October 1974 regulations governing services to patients in skilled nursing facilities.

Under the proposed regulations, every ICF facility was required to establish admissions and discharge procedures which assured that: (1) no resident is accepted whose needs could not be met; (2) the resident is transferred promptly when, due to changes in his condition, his needs can no longer be met by the facility; and (3) the resident's next of kin, attending physician, or the responsible agency is informed in advance before transfer or discharge (except in emergency circumstances) and that adequate planning precedes such discharges or transfers. In addition, the facility must establish policies on the use of physical restraints.

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Each resident admitted to the facility was required to be:

fully informed of his rights and responsibilities as a resident;

fully informed of the services available, including any non-Title XIX reimbursable costs that he or she will be obligated to pay;

fully informed by his physician of any health or medical condition (unless medically contraindicated) and be afforded an opportunity to participate in the development of his personal health or medical treatment plan (including the right to refuse to participate in experimental research);

transferred or discharged only for medical reasons, non-payment of bills, or for his own welfare or that of other patients;

encouraged and assisted in exercising his rights as a resident and as a citizen (including the right to voice grievances against facility policies without fear of reprisal);

permitted to manage his own personal financial affairs;

free from mental and physical abuse and chemical and physical restraints (except that physical restraints were permitted when necessary to protect the resident from injury to himself or others);

insured confidential handling of his personal and health records;

treated with consideration, respect and full recognition of his dignity and individuality;

allowed to refuse to perform services for the facility which are not a written part of his plan of therapy;

permitted to associate and communicate with persons of his own choosing and to send and receive personal mail unopened;

allowed to participate in social, religious and community activities at his discretion, unless medically contraindicated;

permitted to retain his personal clothing and possessions as space permits;

insured privacy, if married, for visits with his or her spouse and be allowed to share a room (unless medically contraindicated) if both husband and wife are residents of the facility.

Where the ICF resident has been adjudicated incompetent or been declared incapable of understanding his rights, his physician, a guardian, next of kin or sponsoring agency was allowed to act on his behalf on the first four points specified above.

In addition to the above rights, an ICF resident who was mentally retarded was not permitted to participate in a behavior modification program unless the consent of his parent or guardian had been obtained in advance.

* * * * *

On March 29, 1976, HEW published final regulations governing the rights of residents in federally supported intermediate care facilities (41 CFR 12883). Contained in the final rules were a number of modifications in proposed regulations issued in March 1975.

Among the key revisions made in the final regulations were the following:

Parental consent is required in the case of mentally retarded residents only when the resident is to participate in "a behavior modification program involving use of restraints or aversive stimuli". The proposed rules would have required parental consent before a retarded resident could participate in *any* behavior modification program.

Residents are allowed to participate in the development of their total care plan, rather than in just their health and medical care plans.

A Qualified Mental Retardation Professional (QMRP) is permitted to decide whether a retarded resident is capable of understanding his rights. Under the proposed rules, only a physician could have made such a determination.

A resident, or person acting in his behalf, must be notified at least five days in advance of any proposed transfer or discharge;

QMRP's, as well as physicians, are authorized to order chemical and physical restraints in ICF/MR facilities;

Every facility is required to establish an internal mechanism for receiving and acting upon resident grievances;

A resident must be given written notification of the facility's services and charges;

A resident is not required to perform services for the facility. However, when it is agreeable to the resident and appropriate for either therapeutic or diversional reasons, such services may be included in his care and treatment plan.

Cost Related Reimbursement. On July 1, 1976, the Social and Rehabilitation Service published final rules (41 CFR 27299) governing federal reimbursements to skilled nursing and intermediate care facilities certified under Title XIX of the Social Security Act.

The regulations are designed to implement a 1972 amendment to the Act (Section 249(d), P.L. 92-603), which provides that state Medicaid plans for reasonable cost-related reimbursement must be in operation by July 1, 1976.

Previously, states were free to establish their own Medicaid reimbursement plans, provided payments to ICF's and SNF's did not exceed certain upper limits. Most states set per diem rates in advance which, at least theoretically, were to be adequate to support the quality of care HEW standards required. In practice, however, the rates were too low or too high in light of the services actually delivered to patients. As a result, Congress amended the law to require the states to adopt cost-related reimbursement procedures.

The regulations include provisions which:

Penalize facilities failing to meet certification standards by reducing their profit and incentive factors and prohibiting reductions in service to compensate for any reimbursement penalties;

Forbid states from making payments which are lower than indicated by uniform cost data. Payment of a profit as a return on the owner's net equity is optional with the state;

Require the states to develop reimbursement formulae that recognize costs for room, dietary and nursing services, mandated social services, minor medical and surgical supplies, and the use of equipment and facilities. "All items of expense which providers must incur" in order to meet SNF and ICF standards and applicable state health/licensure requirements are considered allowable costs under Title XIX;

Require HEW approval of all state Medicaid reimbursement formulae;

Require uniform statewide cost reporting.

In effect, states are given a choice between adopting the existing Medicare reasonable cost reimbursement formula or developing their own methods. In any case, the objectives are the same: to minimize windfall profits or unjustifiably low payments, to prevent manipulation of nursing home property values, and to promote more efficient facility management and better patient care.

The new regulations became effective July 1, 1976. However, the states are given eighteen months (until January 1, 1978) to fully implement cost-related reimbursement plans. The initial cost reporting period must begin no later than January 1, 1977.

Authority to Waive ICF and SNF Standards. In early 1975 Secretary Caspar Weinberger announced the issuance of proposed regulations which would grant authority to HEW to modify or waive safety and environmental standards in all skilled nursing care facilities (SNF's) and intermediate care facilities (ICF's) supported by federal Title XIX funds (40 CFR 6368). Previously, state Medicaid survey agencies had been empowered to grant such waivers to all ICF's with Medicaid patients and SNF's which were Medicaid certified only.

Later in the year, however, Secretary David Mathews withdrew the proposed regulation as part of a Department-wide effort to minimize the degree of federal regulatory intervention into the lives of American citizens (40 CFR 51474). This action returned the waiver authority to state agencies.

Standards currently subject to modification or waivers include the Life Safety Code for ICF's, room sizes and occupancy limits in ICF's (and SNF's certified only for Medicaid), and the ANSI standards for facilities serving the physically handicapped.

Inpatient Psychiatric Services for Children. Final regulations designed to extend Medicaid benefits to children residing in qualified psychiatric hospitals were promulgated by HEW on January 14, 1976 (41 CFR 2197). The purpose of these rules is to implement a provision added to the Social Security Act by Congress in 1972. Only minor technical changes were made in the proposed regulations issued on March 25, 1975 (40 CFR 13141). Under the new regulations, states are permitted to include inpatient psychiatric services for children as an optional service in their Medicaid plan, provided that:

Such services are limited to individuals under 21 years of age (or under 22 if they received services immediately prior to attaining age 21).

Participating facilities are psychiatric hospitals accredited by the Joint Commission of Accreditation of Hospitals.

Individuals participating in the program after the date of the final regulations must have been determined to require inpatient services by a qualified team, including a physician.

All eligible patients must be receiving active treatment. The term "active treatment" is defined in the regulations as "implementation and administration of a professionally developed and supervised individual plan of care. . ." which sets forth treatment objectives, activities and therapies designed to enable the individual to improve to the point where institutional care is no longer necessary.

The individual plan of care must be developed and implemented within 14 days after admission and reviewed every 30 days thereafter by an interdisciplinary team to determine the effectiveness of the services rendered.

The interdisciplinary team must be composed of physicians and other persons whose experience and training enable them to assess the patient's needs and render appropriate services. Such individuals must be employed by the institution or provide services to patients in the facility.

States must meet maintenance of fiscal effort requirements in order to qualify for federal financial participation under Title XIX.

2. Home Health Services

HEW's Social and Rehabilitation Service published revisions to existing home health services regulations under Medicaid (40 CFR 36702) on August 21, 1975. The revisions are intended to encourage the wider use of home health services as an alternative to institutional care for Medicaid recipients.

The major changes in the August 21 regulations include:

Authority for certain types of qualified health services agencies, in addition to those which meet Medicare standards, to provide home health services under a state's Medicaid program;

prescription of standards applicable to home health agencies; these standards are similar to those applicable under Medicare, except they have been modified to account for differing needs under Medicaid;

permission for proprietary agencies to provide home health services (if they meet regulatory standards), regardless of whether or not the state has a licensing law;

permission for states to provide various therapies (physical, occupational and speech therapy) as part of home health services; in addition, the proposed regulations clarify the fact that states must make available three main types of services: nursing, home health aide, and supplies and equipment;

clarification of the fact that Medicare requirements relating to need for "skilled" care or to post-hospitalization do not apply under Medicaid;

requirement for a physician's determination of medical needs recorded (and periodically reviewed) in a plan of care;

clarification of which Medicaid recipients must have home health services available.

* * * * *

Interim regulations covering grants to meet the initial cost of establishing home health agencies and expanding the services of existing agencies were published in the *Federal Register* on August 19, 1976 (41 CFR 55140). The purpose of these tentative rules was to implement Title VI of P.L. 94-63, which authorizes the grant program.

Three million dollars was available in Fiscal Year 1976 to provide demonstration grants to public and nonprofit private agencies interested in furnishing home health services to the elderly and medically needy.

Funds are divided among the HEW Regions based on the relative needs of the states within each region. Relative need for home health services is determined by comparing the proportionate number of people in each state who are elderly, medically indigent, or both.

Services are to be provided without charge to individuals with incomes below the Community Services Administration's Income Poverty Guidelines and on a discounted basis to persons with incomes not exceeding twice the CSA guidelines.

3. Health Planning

During 1975 HEW initiated steps to implement sweeping new health planning legislation enacted by Congress in late 1974.[1]

In the summer of 1975, the Secretary of HEW approved the boundaries of over 200 health services areas across the country. Later that year the Department issued proposed regulations governing Health Systems Agencies (40 CFR 48801).

Final rules governing Health Systems Agencies were published in the *Federal Register* on March 26, 1976 (41 CFR 12812). Amendments to these regulations were issued later in the year (41 CFR 41089) to alter the funding formula for provisionally designated HSA's.[2]

The statutory purposes of a Health Systems Agency (HSA) is to provide effective health planning in its designated health service area and to promote the development within the area of the services, manpower,

[1] The National Health Planning and Resources Development Act of 1974 (P.L. 93-641) added Title SVI (National Health Planning and Development) to the Act.

[2] Further amendments to the March 26, 1976 regulations were published on April 6, 1977 (42 CFR 18279).

and facilities necessary to meet the documented health needs of the population. In addition to planning general and specialized health programs for the handicapped, HSA's have a primary responsibility for certifying the need for new and expanded institutional health services, including long term care facilities for handicapped clients.

On March 19, 1976 HEW issued proposed regulations (41 CFR 11688) which: (a) outline the procedures to be followed in reviewing new institutional health services; (b) establish rules governing State Health Planning and Development Agencies; and (c) set limitations on federal participation in capital expenditures.[3] Later in the year, the Department issued interim regulations governing the designation and funding of State Health Planning and Development Agencies (41 CFR 22524).

4. Facilities Construction

Proposed regulations governing a program to eliminate safety hazards and upgrade standards in public medical facilities were issued on November 29, 1976 (41 CFR 51079) by the U. S. Public Health Service. The new rules are intended to implement a provision contained in P.L. 93-641, the National Health Planning and Resources Development Act of 1974.

P.L. 93-641 authorizes the Secretary of HEW to make grants "for construction or modernization projects designed to: (1) eliminate or prevent imminent safety hazards as defined by Federal, State, or local fire, building or life safety codes or regulations, or (2) avoid noncompliance with state or voluntary licensure or accreditation standards" (Section 1625, Part D, Title XVI, Public Health Service Act, as amended). Grants may be made to any medical facility owned and operated by a state or a political subdivision of a state, including cities, towns, counties, boroughs, hospital districts, or public or quasi-public corporations.

The amount of grant support under Section 1625 may not exceed 75 percent of the cost of the construction or modernization project, except in urban or rural poverty areas. In such poverty areas, grants may cover up to 100 percent of the costs. The Secretary may not approve a grant application unless the state health planning and development agency has determined that the applicant could not complete the project without such assistance.

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[3]Final revised regulations were issued on January 21, 1977 (42 CFR 4002) with an effective date of February 22, 1977. Subsequently, the January 21 regulations were amended to tighten somewhat the requirements for approving new institutional services (42 CFR 18605).

Twenty-two percent of the funds appropriated annually under the revised Hill-Burton program must be earmarked for projects under Section 1625 (i.e., the funds must be used for projects to eliminate safety hazards or avoid noncompliance with licensure or accreditation standards in publicly operated medical facilities). In FY 1976, $11.4 million was appropriated for Section 1625 projects.

Only projects designed to correct physical problems which threaten the loss of the facility's licensure, eligibility for Medicaid or medicare reimbursements, or the closing of the facility are considered fundable under the new program. This policy, while not explicitly spelled out in the authorizing statute, reflects the legislative intent of Congress.

The regulations also require a finding under the state's certificate of need program. If such a program does not exist in the state, or is not relevant to the particular application, the state health planning and development agency must make a separate finding of need using the criteria established under Section 1122 of the Social Security Act.

5. Physical Therapy and Speech Pathology Benefits Under Medicare

On May 21, 1976 the Social Security Administration published final regulations governing the conditions of Medicare participation by clinics and rehabilitation and public health agencies providing outpatient physical therapy and speech pathology services (41 CFR 20863). These rules are designed to implement several 1972 amendments to the Social Security Act which expand federal health care benefits available under Medicare to aged and disabled recipients.

6. Community Mental Health Centers

On June 30, 1976 HEW issued interim rules governing the award of federal grants to community mental health centers (41 CFR 18783). Later in the year a complementary set of proposed amendments to CMHC regulations also were published by the Department (41 CFR 48242). Both sets of rules were intended to implement the Community Mental Health Centers Amendments of 1975 (Title III, P.L. 94-63).

Among the most important provisions in the proposed regulatory amendments were sections dealing with: (a) the composition of a center's governing body; (b) the duties and responsibilities of the center director; and (c) the qualifications of staff providing services to children, consultation and education services, services to the elderly, alcoholism and alcohol abuse services, and drug abuse services.

7. Maternal and Child Health and Crippled Children's Services

Proposed regulations governing the consolidation into each state's ma-

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ternal and child health and crippled children's plan activities previously funded under federal project grants were promulgated by HEW on March 25, 1975 (40 CFR 13287). Later in the year these rules were published in final form with only minor modifications (40 CFR 54101).

The purpose of the regulations was to implement a Congressional mandate that the following five project grant programs be folded into the federal-state MCH-CC grant program, effective July 1, 1974:

maternity and infant care

intensive infant care

family planning services

health of children and youth

dental health of children

These special target programs are authorized under Section 508, 509, and 510 of the Social Security Act.

8. Early and Periodic Screening, Diagnosis and Treatment

On August 20, 1975, HEW published proposed regulations designed to implement a new penalty provision applicable to states which fail to implement effective early and periodic screening, diagnosis and treatment programs for Medicaid-eligible children (40 CFR 36378).

Under the revised penalty provision, enacted by Congress in 1972, a state's federal share of funds under the Aid to Families with Dependent Children (AFDC) program is reduced by one percent if it fails to: (1) inform adults in AFDC families of the availability of child health screening services; (2) provide or arrange for such services; or (3) arrange or refer for corrective treatment children found to suffer from an illness or disability.

While the EPSDT program has not been fully implemented in many states, it has proved to be a cost-effective means of locating youngsters - particularly pre-school children - with handicapping conditions.

EDUCATION

During 1975 and 1976 the Office of Education issued a series of sweeping new regulations designed to implement the "Education Amendments of 1974" (P.L. 93-380) and the "Education for All Handicapped Children's Act of 1975" (P.L. 94-142).

1. Handicapped Education Grants to the States

Implementation of the 1974 Amendments. Final regulations and guidelines governing assistance to the states under Part B of the Education of the Handicapped Act were issued by the Office of Education on May 1, 1975. The basic purpose of these regulations was to recodify Part B rules (40 CFR 18998).

* * * * *

On November 26, 1975, the Office of Education published proposed regulations requiring states to identify and serve all handicapped children and take steps to insure the confidentiality of children's records (49 CFR 54805). The new rules were intended to implement several provisions of the Education Amendments of 1974.

Under the proposed amendments, states were required to include in their annual program plans, policies and procedures which insured that:

all handicapped children residing in the state, who are in need of special education and related services, are identified, located and evaluated;

the confidentiality of the records of handicapped children is maintained;

a goal is established to provide full educational opportunities for all handicapped youngsters;

a timetable is specified for accomplishing the goal; and

a description of needed facilities, personnel and services is included.

The plans developed by a state were to be made available to parents and other members of the general public at least thirty days before they are submitted to the U.S. Commissioner of Education.

The new regulations also spelled out criteria which states must use in developing their policies and procedures for protecting the confidentiality of data on handicapped children. These criteria were to include provisions relating to notification, access rights, hearing rights, consent, state and local access to data, safeguards, destruction of data, and children's rights.

* * * * *

The Bureau of Education for the Handicapped published in the February 27, 1976, issued of the *Federal Register* (41 CFR 8903) final regulations requiring state education agencies to: (1) spell out policies and procedures for locating, identifying, and evaluating all handicapped children residing in the state who are in need of special education and related services; and (2) develop policies and procedures to protect the confidentiality of data collected on handicapped children.

Numerous modifications were made in the proposed rules published in November 1975. For the most part, these changes were intended to elaborate on the due process safeguards available to parents and guardians of handicapped youngsters.

Implementation of the 1975 Act. On December 30, 1976 the Office of Education published proposed rules (41 CFR 56967) implementing the Education for All Handicapped Children's Act of 1975 (P.L. 94-142). These long awaited regulations were designed to implement extensive amendments to Part B of the Education of the Handicapped Act.

The preamble to the December 30 regulations indicates that Office of Education officials have attempted to write minimum rules with the intent of amending and revising them as experience dictates. Implementation of P.L. 94-142 is viewed as "an evolutionary process which will continue over a period of several years."

In drafting the proposed regulations, Departmental officials also made the Part B rules consistent with regulations implementing Section 504 of the Rehabilitation Act of 1973. Under the latter set of regulations (see p. 41), federally funded public educational agencies are required to make available free appropriate education services to all handicapped children.

The following are the highlights of the proposed December 30 regulations:

Applicability. Subpart A makes it clear that the regulations are intended to apply to all public education agencies in a state that have direct or delegated authority for the education of handicapped children. In explaining the statutory basis for this interpretation, OE officials point to Section 612 of P.L. 94-142, which requires, as a condition for receiving Part B support, that the rights and protections of the Act extend to all handicapped youngsters. In addition, the right to education provisions in the Section 504 regulations are cited as a basis for this ruling.

State Annual Program Plans. In order to qualify for a Part B grant, a state is required to submit to the U. S. Office of Education an annual program plan. This plan must include a statement describing the purposes for which federal funds will be expended during the fiscal year.

Services. In accordance with the provisions of the statute, Section 121a.200 of the proposed regulations would require each state to insure that free appropriate public education is available to all handicapped children between the ages of 3 and 18 by September 1, 1978, and to all such children between the ages 3 and 21 by September 1, 1980. However, this provision will not apply to children ages 3-5 and 18-21 if it is inconsistent with state law or practice or the order of any court.

Free appropriate public education would have to be made available to all handicapped children within the state's mandated age ranges by the dates set forth above. If a state does not have a mandatory law, then all handicapped children ages 6-17 would have to be provided a free appropriate education within the statutory time limits.

If a state makes public education available to all non-handicapped children between the ages 3-5 and/or 18-21 (e.g. kindergarten for five-year-olds), it would have to serve all handicapped children in that same age group by the dates specified in the law. Similarly, if a state makes available public education to a majority of handicapped children in the 3-5 or 18-21 age ranges, it would have to make services available to all handicapped youngsters.

Whenever placement in a public or private residential program is required to provide free appropriate public educational services to a handicapped child, the program, including room and board, would have to be provided at no cost to the child's parents. States are permitted to utilize whatever methods and sources (federal, state, local, or private) to pay the cost of such residential placements.

Service Priorities. P.L. 94-142 requires state and local educational agencies to give first priority to serving handicapped children not receiving an education. The second priority must be children with the most severe handicaps who are receiving an inadequate education.

The proposed regulations specify that all Part B funds must be used to furnish first priority children, ages 3-21, with direct special education and related services to the extent that the state's mandatory law applies to children within this age range. No funds may be expended on second priority children until all first priority youngsters are receiving a free appropriate public education.

Individualized Education Programs (IEP). An IEP must be developed on every handicapped child receiving special education and related services. This program is a written statement, jointly developed by the teacher, the child (where appropriate), the parent, and the local school representative, which documents the decisions reached about the objectives, contents, implementation, and evaluation of the child's education. According to the preamble to the regulations, the IEP is not viewed by the Office of Education as a legally binding document.

Due Process Procedures. For the most part, the Department has elected to incorporate in the December 30 regulations the verbatim statutory language which guarantees parents procedural safeguards in the provision of special education and related services. Only where additional interpretation seemed essential has the statutory language been expanded (e.g., payment for the cost of an independent evaluation, provision of written notice, conduct of due process hearings, and the appointment of surrogate parents).

Least Restrictive Environment. Section 612 (5) (b) of the Act requires the states to establish procedures for insuring that, to the maximum extent feasible, handicapped children are educated with non-handicapped children. The statute goes on to specify that a handicapped child may be removed from the regular educational environment only when the nature or severity of the handicap is such that education in regular classes, with the use of supplementary aids and services, cannot be achieved satisfactorily.

The proposed regulations require each state educational agency to inform other public educational agencies about the least restrictive alternative, to assist them in implementing it, and to monitor

their progress. To alleviate fears that implementation of the least restrictive alternative may lead to inappropriate mainstreaming, the regulations would require: (a) that each child's educational placement be determined at least annually and be based on his or her IEP; and (b) that steps be taken to assure that implementation of this provision does not harm the child or reduce the quality of his or her services. When there is evidence which suggests that a local educational agency is placing children without regard to their specific individual needs, the state education agency would be required to assist in planning and implementing necessary corrective action.

Child Count. The proposed regulations for determining the number of children in need of special education and related services, originally issued on September 8, 1976 (41 CFR 37813), are republished in the December 30 regulations for the convenience of readers.

The data on children being served in special education programs is required by HEW's Office of Education in order to determine allocations to states under the new Act. The formula contained in P.L. 94-142 bases the allocation on the number of handicapped children, ages 3 through 21, served in each state.

The proposed regulations contain sections setting out the reporting requirements; the types of information which must be reported; a certification requirement; the criteria for determining whether a child may be counted; special reporting requirements for FY 1977; and the responsibilities of the state to assure that state and local agencies and institutions provide an accurate and unduplicated count.

Incentive Grants. Part 121m of the proposed regulations spell out the conditions under which states may receive incentive grants to assist in educating handicapped children between three and five years of age. A state which serves any portion of the three, four, or five year old population is eligible to apply for incentive grant support.

Learning Disability Criteria. In compliance with a Congressional mandate, HEW's Bureau of Education for the Handicapped published proposed criteria for determining whether a particular disorder or condition may be considered a specific learning disability within the statutory definition contained in the Education for All Handicapped Children's Act of 1975. The new regulations, which appeared in the November 29, 1976 issue of the *Federal Register* (41 CFR 52403) also include procedures for diagnosing children with suspected learning disabilities and monitoring the manner in which these rules are applied by state and local education agencies.

BEH considered but rejected the possibility of recommending legislative changes in the definition of the term "children with specific learning disabilities." After consulting with experts in the fields of education, psychology, and medicine, agency officials concluded that there is "little general agreement on what conditions could and could not be considered a specific learning disability." Therefore, it was decided to set out specific diagnostic procedures and criteria for determining whether a particular condition meets the statutory definition.

Among the major features of the proposed criteria are the following:

All evaluations of children with suspected learning disabilities must be conducted by a team composed of appropriate professionals;

In order to be found learning disabled, a child must suffer from a severe discrepancy between achievement and intellectual ability in one or more of the following areas: oral expression, written expression, listening or reading comprehension, basic reading skills, mathematical calculations or reasoning, or spelling. A "severe discrepancy" is defined to exist when achievement in one or more of the above areas falls at or below 50 percent of the child's expected achievement level considering the child's age and previous educational experiences.

A child may not be identified as learning disabled if his or her learning problem is primarily the result of visual, hearing, or motor handicaps, mental retardation, emotional disturbance, or environmental, cultural, or economic disadvantage;

The evaluation process must include a medical examination where it is suspected that the child has an educationally relevant medical problem;

The child's academic performance must be observed in the classroom;

The results of all evaluations must be documented in a written report which includes full information about the team's findings, decisions, and recommendations.

The regulations also spell out the monitoring responsibilities of state educational agencies and the U. S. Office of Education.

The learning disabilities criteria is intended to insure that children are appropriately evaluated and not mislabeled. It also provides a common standard for counting children who suffer from such disorders.

P.L. 94-142 specifies that learning disabled children may not consti-

tute more than one-sixth of the children eligible to be counted as handicapped. Another statutory limitation is that a state may not count as handicapped more than 12 percent of the total school age population between 5 and 17 years of age.

In other words, even though a state may be serving a larger percentage of learning disabled children, no more than two percent of the total school aged population can be so categorized for purposes of the P.L. 94-142 count. Congress, however, has provided that this two percent "cap" will be removed once final regulations are effective.

2. Early Childhood Education

In 1976 the Office of Education released final regulations governing grants to assist states in implementing broad scale plans for aiding pre-school handicapped children.[4]

In order to qualify for grant assistance under the Early Childhood Education Program, the August 10, 1976 (41 CFR 33558) regulations require state education agencies to prepare detailed plans for furnishing pre-school and early education services to all handicapped youngsters in the state. This plan must include:

A description of pre-school handicapped children in the state, including their age, level of functioning, and handicapping conditions;

Strategies for providing comprehensive services to all pre-school handicapped children;

A description of procedures for grouping children according to their individual needs;

A discussion of the overall goals and objectives of the statewide plan;

A timetable for implementing these early education goals and objectives;

Strategies for assuring parental participation in the implementation of the statewide plan.

The Bureau of Education for the Handicapped is responsible for providing technical assistance to state education agencies to help them assess the adequacy of their current programs and develop a statewide plan for expanding early education services.

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[4]Earlier in the year, proposed early childhood education regulations were issued by the Office of Education (41 CFR 11180).

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3. Regional Education Programs for the Handicapped

Final regulations implementing Part C of the Education of the Handicapped Act (Regional Education Programs) were issued on June 15, 1976 (41 CFR 24125). These regulations contained only minor changes in the proposed rules which had been published on November 11, 1975 (40 CFR 52629). These centers are designed to help handicapped students in vocational, technical, post secondary, or adult education to participate in regular school programs.

Through grants to institutions of higher education, vocational and technical institutions, and other non-profit educational agencies, support services, such as interpreters for the deaf, notetakers and readers, wheelchair attendants, job placement and follow-up, guidance counselors, and instructional media are provided to handicapped persons in multistate regions with large populations.

4. Aid to State Operated and Supported Schools

Handicapped children who have been transferred from state operated and supported schools to local education agencies may continue to receive federal financial assistance under proposed regulations issued April 13, 1976 (41 CFR 15532) by the Department of Health, Education, and Welfare. The new rules are intended to implement 1974 amendments (P.L. 93-380) to Title I of the Elementary and Secondary Education Act.

Soon after Congress passed the Elementary and Secondary Education Act (P.L. 89-10) in 1965, the legislation was amended to authorize federal aid for children being educated in state operated and supported schools (P.L. 89-313). During FY 1977 state agencies will receive approximately $110 million of Title I assistance on behalf of handicapped children.

In the past, if an institutionalized child moved to a local public school, the state was no longer permitted to include the child in its average daily attendance count. Under the proposed regulations, the state may continue to count such a child provided that: (a) the child was enrolled in a state agency school for at least one school year between school year 1971-72 and the present; (b) the child continues to receive an appropriately designed educational program; and (c) the state agency transfers to the local educational agency an amount equal to the federal aid attributable to the child.

One other major change is the revised policy on parental fees. Under existing regulations, only educational services to Title I children have to be rendered without charge to the parents. The revised rules, however, stipulate that parents could not be charged "for any special educational services. . .or for other related services provided to enable. . .[eligible

children] to benefit from a special educational program (including the cost of services such as room, board, or medical care which are provided in an institutional residential care facility in which the child is placed by the State agency)." The April 13 regulations spell out the procedures for transferring federal funds between state and local educational agencies, outline the process of counting children in average daily attendance, and specify program requirements and allowable costs of services to handicapped children under the Title I program.

5. Personnel Training

During 1976 regulations governing Part D of the Education of the Handicapped Act were amended to add a new list of funding priorities for personnel preparation.

The September 1 regulations (41 CFR 36822) set forth the following priority areas for the award of training grants to institutions of higher education:

early childhood education;
severely and multiply handicapped children;
paraprofessionals;
physical education;
interdisciplinary training;
general special education;
vocational and career education;
regular education;
developmental assistance;
model implementation;
volunteers.

6. Career Education

On December 1, 1975 proposed career education rules were released by the Office of Education; these regulations were designed to carry out Section 406(f) of the 1974 amendments (40 CFR 55659).

Under these amendments the Commissioner of Education is authorized to make grants to state and local education agencies, institutions of higher education, and other non-profit agencies to demonstrate the most effective methods of career education and develop exemplary program models. Included must be models in which handicapped children receive appropriate career education, either in regular or modified programs with non-handicapped children or in specially designed programs for severely handicapped youngsters who are unable to benefit from regular programs.

7. Impact Aid

Under proposed rules published by the Office of Education on December 5, 1975, a local school district would be entitled to 150 percent of the district's regular per pupil entitlement for each handicapped child of a parent on active military duty (40 CFR 57041); however, the child must be enrolled in a program which meets his or her special educational needs. This section of the new regulations would implement another provision of P.L. 93-380.

8. Head Start Performance Standards

Proposed performance standards for the operation of Head Start programs serving needy pre-school children were issued by the Office of Child Development on January 31, 1975 (40 CFR 4757). Later in the year final performance standards were issued with only slight modifications (40 CFR 27561) as well as a proposed self-assessment/validation instrument to be used by Head Start granters in conducting an annual review of their activities (40 CFR 50950).[5]

9. Adult Education

Revised regulations governing the federal Adult Education Act were released on January 21 by the Office of Education (40 CFR 3381). These proposed rules are intended to implement the 1974 amendments to the Act.

The most interesting provision of the new regulations is one which permits a state to use up to 20 percent of its formula grant funds under the Adult Education program for "establishing and carrying out adult basic education programs for institutionalized adults." The definition of an "institutionalized person" in the proposed regulations is: (1) "an adult sixteen years of age or older who does not have a certificate of graduation from a school providing secondary education and is an inmate, patient or resident of a penal institution, reformatory, residential training school, orphanage, or general or special institution or hospital; or (2) an adult in a residential school for the physically or mentally handicapped."

[5]The final self-assessment/validation instrument appeared in the July 1, 1976 issue of the *Federal Register* (41 CFR 27197).

SOCIAL SERVICES

During 1975 a series of regulations was issued by HEW governing the use of social services grant-in-aid funds, authorized under Title XX of the Social Security Act. The impetus for this flurry of regulatory activity was the enactment by Congress of the "Social Services Amendments of 1974" (P.L. 93-647) which completely revamped the federal-state social services program.

1. Proposed Regulations

On April 14, 1975 proposed Title XX regulations were issued by the Department (40 CFR 16801). These regulations were divided into nine parts. Subpart A contained definitions of terms used in the regulations and a brief overview of the services program. Subpart B spelled out the state plan, reporting, maintenance of effort and compliance requirements while Subpart C specified the contents of the state's service plan and the process for soliciting public comments. Subparts D and F set forth the limitations on federal financial participation with respect to specified services, rates and conditions for matching, and the eligibility of individuals. Subpart G detailed the rules governing purchase of service agreements. The conditions under which Title XX funds could be used for training purposes were spelled out in Subpart H and, finally, Subpart I listed the administrative expenditure for which federal financial participation would be available.

Some of the most important provisions of the new regulations were contained in Subpart D which specified the limitations on using Title XX funds for certain services. The following is a brief analysis of the most relevant provisions in this section of the regulations:

Payments for *medical and remedial care* were limited to situations where such services were "an integral but subordinate part of a service described in the [state's] service plan." In any case, the cost of medical or remedial care was not to exceed 25 percent of the total cost of the service.

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Room and board could be paid for with Title XX funds only when it was an integral but subordinate part of a social service and, then, for a period not to exceed six consecutive months. In addition, the cost of room and board could not exceed 30 percent of the total cost of the service or, if either room or board was provided separately, no more than 20 percent of the total cost.

In-home child care services could be supported only when the program met state established standards which were reasonably in accord with national standard setting organizations.

Only *out-of-home child care* facilities which meet the 1968 Federal Interagency Day Care Requirements, as modified by the provisions of Title XX, would be considered eligible recipients of federal social services funds.

Title XX funds could not be used to provide *educational services* made available through any state or local educational agency without cost and without regard to income.

Federal financial participation was precluded for services to *individuals living in hospitals, skilled nursing facilities, intermediate care facilities* (including hospitals or facilities for mental disease and for the mentally retarded), or prisons, except under very restrictive circumstances.

Title XX funds could not be used to pay for *foster family care* but could cover special services to residents in foster family homes.

Emergency shelter could be provided to children only when there was a clear and present danger of abuse, neglect or exploitation and, then, for a period not exceeding 30 days in any twelve month period.

As a general rule Title XX funds could not be used to make cash assistance payments.

Subpart F of the April 14 regulations spelled out the income eligibility and fee standards. Within the statutory eligibility limits established by Congress (i.e., AFDC, SSI or Medicaid eligible individuals or families, and families with gross incomes up to 115 percent of the median income to the state), HEW permitted the states rather wide latitude in establishing income eligibility levels. For example, a state could set an income level which: (1) was lower than 115 percent of the state's median income; (2) varied for different services specified in the state's plan, or (3) varied according to different categories of individuals covered under the plan.

In adjusting family median income figures to the size of the family, the following percentages of the state's median income for a family of four

were applied:

One person - 36 percent
Two person family - 60 percent
Three person family - 82 percent
Four person family - 100 percent
Five person family - 116 percent
Six person family - 131 percent
Seven or more person family - add one percentage point for each additional person over six.

These adjustment factors were based on data supplied by the Bureau of Labor Statistics, Department of Labor.

HEW elected to delegate to the states responsibility for establishing fee schedules, in accordance with criteria specified in the statute and in the April 14 regulations. A state was required to impose a fee, reasonably related to income, if the individual or family was eligible because of their income status - i.e., their income fell between 80 to 115 percent of the state's median income, adjusted for family size, and they were not eligible for SSI or AFDC. States were permitted to impose service fees on individuals or families receiving federally aided income maintenance payments or whose median income, adjusted for family size, fell below 80 percent of the state's median income. However, they were not obligated to do so.

Such fees could not be designed to discourage utilization of needed services and had to be positively related to the person's ability to pay. However, states were allowed to establish different fees for different services.

Information and referral services and services to prevent or remedy neglect, abuse or exploitation of children and adults were to be furnished to any citizen, regardless of income.

Information and referral services were defined in the regulations as "information about services provided under Title XX and related service programs, brief assessment (but not diagnosis and evaluation) to facilitate appropriate referral and referral to and follow-up with those community resources which provide or make available such services . . . " Reimbursement for information and referral services was permitted under Title XX only when they were provided by an agency with a specific I and R function and staff with identifiable I and R related tasks.

Services to prevent or remedy neglect, abuse or exploitation were specifically limited by the regulations to the following:

Children (under 18). Only when a child was threatened with harm by a person responsible for his or her health or welfare could the

following services be provided: (a) identification and diagnosis; (b) receipt of reports and investigations, thereof; (c) determination that the individual is vulnerable or at risk of neglect, abuse or exploitation; (d) counseling and therapy and training courses for the parents of the individual; (e) emergency shelter under the circumstances specified above; (f) legal representation of the individual; and (g) arranging for the provision of services.

Adults (18 or over). Only the following services could be provided to adults who were unable to protect their own interests due to ignorance, incompetence or poor health: (1) identifying such adults who need assistance or who have no one willing and able to assist them responsible; (b) investigating complaints from adults at risk or persons acting on their behalf; (c) diagnosing the individual's situation and service needs; (d) counseling such adults, their families or other responsible surrogates; (e) arranging appropriate alternate living arrangements; (f) aiding in the location of medical care, legal services and other community resources; (g) arranging guardianship, commitment or other protective placement, as needed; (h) providing advocacy, including legal services, to assure that the at risk adult receives his or her rights and entitlements.

In order to qualify for federal assistance, the April 14 regulations required each state to prepare a Comprehensive Annual Services Program Plan outlining, in detail, its proposed spending priorities. This plan had to be made widely available for public review and the public had to be given at least forty-five days in which to comment on the single state agency's proposals. At the end of this comment period, the state agency was responsible for preparing and submitting to the federal government its final CASP plan.

2. Final Regulations

HEW Secretary Caspar W. Weinberger announced the publication of final Title XX regulations on June 25, 1975 (40 CFR 27351). Although the basic structure and contents of the April 14 regulations were retained there were numerous modifications in the final rules based on over 3,700 comments HEW received from state and local officials, national consumer organizations, service providers and other interested citizens.

The following were among the major changes in the June 25 rules:

The allowable percentages for determining when the cost of *room and board* can be considered an "integral but subordinate" part of a social service was increased. Under the final rules, the cost of room or board alone may not exceed 25 percent (instead of 20 percent) of the total cost of the program or 40 percent (instead of 30 percent)

in cases where both room and board are furnished. In addition, the six-month limitation was clarified to allow only one period during any twelve months and one period per episode of placement.

The definition of "board" was expanded to include federal financial participation in the costs of meals in day care centers and other social services programs, provided less than three meals a day are served and the meals are not intended to meet the full nutritional needs of the participants.

Staffing ratios for *day care centers* were modified. For children under three years of age, one adult is required for every four youngsters. In addition, the proposed requirements applicable to family day care homes serving children under three were deleted. Instead, such homes will have to meet the 1968 Federal Interagency Day Care Requirements.

The prohibition against using Title XX funds to pay for *"educational services"* (Section 228.43) was revised to stipulate that such service must be "generally" available through a state or local educational agency.

The exclusion against payments on behalf of *residents in hospitals, skilled nursing facilities, intermediate care facilities* (including institutions for the mentally retarded) and prisons is modified to permit federal financial participation in the cost of staffing service oriented facilities, such as halfway houses which provide transition from prisons and institutions back into the community; other short-term services facilities, such as those offering an intensive regimen of services for alcoholics or drug addicts, also would be eligible for federal financial participation under Title XX. Definitions of the terms "hospital", "skilled nursing facility" and "intermediate care facility" also were added in the June 27 regulations.

The final regulations were rewritten to make it clear that *voluntary, federated fund raising organizations* are not considered sponsors or operators of provider facilities. In addition, the term "in-kind" was defined.

Eligibility for services must be redetermined once every three months under the final regulations, rather than continuously as provided in the April 14 regulations. In addition, federal financial participation will be effective from the date of application, rather than from the date of eligibility determination.

The Department of Labor formula for *adjusting medium income* was abandoned and an OEO formula was used in its place. One of the effects of this change was to increase the allowable income ceilings for single persons (from 36 to 52 percent of the state's medium income).

The section dealing with *services to prevent or remedy neglect, abuse, and exploitation of children and adults* was broadened to cover advocacy services to children as well as adults.

3. Modifications in the Final Regulations

On October 3, 1975 HEW issued a series of amendments to the final Title XX regulations in order to prevent recipients who failed to meet their state's Title XX means test from losing their social services eligibility (40 CFR 45818).

States which had been furnishing social services on a group-eligibility basis to senior citizens, children, families and others were given until March 31, 1976 (previously December 31, 1975) to determine individual eligibility, using their Title XX means test. In addition, the amount of time permitted to determine the Title XX eligibility of clients previously receiving services under Titles IV-A and VI was extended from three months to six months.

The interval for periodic redetermination of social services eligibility was expanded from three months to six months. The maximum time for determining the eligibility of new applicants was also increased from 10 to 30 days. The October 3 regulations permitted the states to phase in the implementation of individual case files, eligibility records, client service goals and other data requirements over a 225 day period. Originally this information was to be available by October 1, 1975.

Finally, the states' deadline for executing contracts with service providers was extended to March 31, 1976.

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The elimination of costly and burdensome administrative red tape was the main purpose of proposed changes in federal social services regulations published in the August 26, 1976 issue of the *Federal Register* (41 CFR 36155). The proposed rules were the outgrowth of the first comprehensive review of the regulations since the program began on October 1, 1975.[6]

The August 26 regulations proposed the following key changes in Title XX regulations:

Elimination of the need for complex calculations to determine the amounts payable for medical and remedial care and simplification of procedures for deciding when a medical service can be considered "integral but subordinate";

Change in the time limit on federal financial participation in the cost

[6]Final regulations were issued by HEW on January 31, 1977 (42 CFR 5842).

of room and/or board (from a period of six consecutive months in any twelve month period to six consecutive months for any one placement). In addition, the percentage formula for determining when room and board is subordinate to a service is deleted and, instead, states are required to document, in each case, that board or room is necessary to meet the objectives of the service;

Clarification of the prohibition against using Title XX funds to cover the costs of services inherent and intrinsic to the responsibilities of publicly financed institutions (hospitals, skilled nursing facilities and intermediate care facilities);

Permission for foster caregivers, who are qualified by experience, to give special services without receiving further training;

Granting states the option of establishing different income levels for different geographic areas;

Permission for states to redetermine eligibility on an annual rather than semi-annual basis for persons whose income is derived exclusively from pensions and Social Security benefits;

A requirement that purchase of service contracts specify that the provider will impose no fees other than the ones specified in the regulations and the state's Title XX plan;

Permission for direct service and eligibility determination staff of provider agencies to participate in Title XX-funded training;

Expansion of the circumstances under which foster caregivers providing special services may be trained.

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Earlier in the year, HEW had made a series of changes in Title XX in an attempt to eliminate operational problems encountered by the states and vendor agencies. The basic thrust of these amendments, issued on April 2, 1976 (41 CFR 14166), was to streamline the administration of the program and clarify questions which had arisen since Title XX went into effect on October 1, 1975.

Under the April 2 rules, the definition of a family is revised to include a description of a basic family unit so that it can be distinguished from other possible groupings of individuals for the purpose of determining eligibility based on a family's gross monthly income. This definition permits handicapped adults living with their parents and children living in foster homes or with non-legally responsible relatives to be considered one-person families, and thus qualify for Title XX benefits.

In addition, state Title XX agencies are permitted, under the revised rules, to establish any method(s), including a declaration method, to

determine the eligibility of applicants for services. If it chooses, a state agency can use different methods for different services, categories, or geographic areas. However, the state is responsible for monitoring its own method(s) for determining eligibility and taking necessary corrective action if the approach(es) proves faulty.

Perjury penalties are eliminated and in their place is substituted a certification by the applicant that the information he or she submits to establish eligibility is correct. An alternative method for determining eligibility for protective services, which are not means tested, is also spelled out in the revised regulations. Under this procedure, agencies furnishing the protective services are permitted to maintain records concerning the actual or potential abuse, neglect, or exploitation, in lieu of obtaining a written application for service from each child or adult.

Finally, the amended regulations: (a) delete the specified list of non-means tested protective services to children and adults and permit a state to provide any protective service described in its services plan; (b) require that the need for protective services be documented and re-documented at least once every six months; and (c) stipulate that eligibility for protective services be determined on an individual basis (except for cases involving runaways).

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In a regulatory amendment issued on May 19, 1976 HEW revoked the requirement that state Title XX agencies maintain a basic data file on each recipient of federal social services funds (41 CFR 21647). State agencies had been mandated under the original Title XX regulations to assemble and maintain certain specified data on every individual receiving Title XX funds or face the loss of federal financial participation.

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On December 21, 1976 HEW published in the *Federal Register* (41 CFR 55667) a set of regulations designed to implement amendments to Title XX of the Social Security Act. These amendments, which were signed into law by President Ford in early September (P.L. 94-401), modified group eligibility rules, suspended child care staffing standards through September 30, 1977, and authorized $240 million in additional federal social services aid to the states.

Under the December 21 regulations, the requirement for individual eligibility determination is eliminated when a state has ascertained that "substantially all" of the participants in a Title XX funded program have gross monthly incomes of 90 percent of the state's median income, adjusted for family size. The regulations define the statutory term "substantially all" to mean that no less than 75 percent of the persons receiving services on the basis of group eligibility have incomes of under 90 percent of the state's median.

The group method of determining eligibility may be used for any category of service except day care services (except when such services are being delivered to migrant children).

When the state established conditions or characteristics of group eligibility which are subject to periodic change (place of residence, marital status, presence of children) the state must re-establish at least semi-annually that individuals in the group continue to meet the conditions or have the characteristics of membership in the group. However, when specified conditions or characteristics of eligibility are unlikely to change (e.g. the existence of a physical handicap or severe mental retardation), the state need ascertain that such individuals retain the characteristics of the group only once a year.

In order to insure that at least three quarters of the group have incomes of 90 percent of the state's median or less, a state must conduct a validation study within 6 months after initiating group services and repeat such studies at least annually thereafter. These validations may be conducted on a sample basis. If the state is claiming reimbursement on a group basis the initial validation survey must be conducted within three months after issuance of the December 21 regulations (or by March 21, 1977).

Should the state find that less than 75 percent of the recipients of any Title XX funded service have incomes of 90 percent of the state's median income or less, it must take one of the following actions within 75 days: (a) discontinue claiming financial participation for the service received by the particular group; or (b) amend the state's Title XX CASP plan to either delete the service, provide it on an individual eligibility basis, or on a modified group basis.

In order to determine eligibility on a group basis, a state must include in its CASP plan a description of the specific conditions or characteristics, other than income, which must be met in order to establish membership in a target group.

The December 21 regulations also make it clear that the additional state allotments authorized under P.L. 94-401 may be used only for: (a) in-home and out-of-home child day care services; and (b) staff activities in direct support of Title XX child day care services (e.g. licensing, monitoring, and staff training). The basic purpose of these additional funds is to upgrade the quality of services rendered in child care services by encouraging states to promote the employment of AFDC recipients in such programs to the maximum extent feasible.

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EMPLOYMENT

1. Patient Workers

On February 7, 1975 the U.S. Department of Labor published final regulations governing the payment of working residents in public and private institutions for the mentally retarded and mentally ill (40 CFR 5775).

These rules were designed to implement the U.S. District Court's decision in the case of *Souder v. Brennen.* In the *Souder* case the court found that the Labor Department is required to enforce federal wage and hour standards as they affect working residents of hospitals, institutions and similar residential facilities.[7]

The statutory basis for the regulations is found in Section 14(c) of the Fair Labor Standards Act. This section of the law authorizes the Secretary of Labor to issue special sub-minimum wage certificates for employment of handicapped persons. The following three types of special certificates are authorized: (1) certificates for individuals whose earning or productive capacity is impaired by age or physical or mental deficiency or injury (no less than 50 percent of the prevailing wage); (2) certificates for handicapped workers engaged in training and evaluation programs and multi-handicapped workers who are unable to engage in competitive employment, as certified by the state vocational rehabilitation agency; and (3) certificates for clients in work activities centers "whose physical or mental impairment is so severe as to make their productive capacity inconsequential."

The February 7 regulations govern wages for patient workers in hospitals and institutions for the sick, the aged, the mentally ill or defective, including non-resident patients who perform work at the facility. Excluded from coverage of the regulations are patients who are: (1) working for an employer other than the institution or hospital; or (2) working in sheltered workshops and work activities centers which

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[7]On July 24, 1976 the U.S. Supreme Court ruled that federal minimum wage and hour standards may not be extended to employees of state and local governments. One of the effects of this decision is to make the February 1975 regulations inapplicable to patient workers in public institutions and facilities.

are covered under existing minimum wage regulations.

Definitions. Among the key terms defined in the final regulations are the following:

"Hospital or institution" – "... a public or private, non-profit or profit facility primarily engaged in (i.e., more that 50 percent of the income is attributable to) providing residential care for the sick, the aged, or the mentally ill or defected, including but not limited to nursing homes, intermediate care facilities, rest homes, convalescent homes, homes for the elderly and infirmed, half-way houses, residential centers for drug addicts or alcoholics, and the like, whether licensed or not licensed."

"Employment relationship" – "generally arises whenever a patient is suffered or permitted to work... A major factor in determining whether or not an employment relationship exists...is whether the work performed is of any consequential economic benefit to the institution." The regulations go on to point out that performance of personal housekeeping chores, such as maintaining one's own quarters, and the preparation of craft items, under certain circumstances, will not be considered employment. In addition, the existence of an employment relationship is not dependent on the level of performance or whether the work is of therapeutic value to the patient.

"Evaluation and training" – "...a program...which provides competent instruction and supervision and is designed to determine a working patient's potential and to teach adjustment to a work environment or the skills related to one or more types of work." The evaluation and training period may not exceed 12 months including the time the patient worker spent in an employment relationship prior to the issuance of these regulations.

"Work activities center" – "is an administrative classification given to a facility which has an approved program...which is planned and designed exclusively to provide work activities for patients whose physical or mental impairment is so severe as to render their productive capacity inconsequential." Work activities must be part of "a recorded plan of therapy or care for such patients." However, such activities need not be "restricted to a particular physical or program area of the institution, nor to a particular type of work."

"Commensurate pay" – "...means wages which are commensurate with those paid non-handicapped workers in the institution or in industry maintaining acceptable labor standards in the vicinity for essentially the same type, quality, and quantity of work."

Wage Payments. A patient worker whose earning or productive capacity is unimpaired must be paid at least the statutory minimum wage. In addition, for patient workers who are unable to earn the minimum wage, the following four types of subminimum wage certificates are authorized under the regulations:

Any worker subject to an *evaluation and training* certificate must receive commensurate wages, however, no minimum wage guarantee or wage floor is established unless the Labor Department determines that a minimum wage guarantee is in the best interest of patient workers.

Under a *group wage certificate,* patient workers must receive at least the minimum wage or commensurate pay, whichever is higher. The group wage may not be less than 50 percent of the prevailing minimum wage, however.

Under an *individual exception* a patient worker may earn no less than 25 percent of the prevailing minimum wage.

Patient workers subject to a *work activities center certificate* must receive commensurate wages; however, there is no minimum wage unless the Labor Department finds that such a wage floor is in the best interests of the patient workers.

The work performance of each patient worker must be reviewed at least every 3 months during the first six months of the employment relationship and at least semi-annually thereafter and the individual's wages must be adjusted accordingly. This review must compare the individual's performance with that of non-handicapped workers performing similar work in the institution or, if applicable, in nearby industry.

Deductions for Services. No portion of the patient worker's wages may be deducted for the cost of room, board or services. Only a legal payroll deduction may be withheld from the worker's wages. However, the institution may collect the reasonable cost of room, board and other services actually provided to a patient worker, provided such charges are assessed on the same basis as for non-working patients.

Application for Certificates. Applications for all types of subminimum wage certificates must be filed with the Regional (or Caribbean) director of the Wage and Hour Division. Applications for an evaluation and training certificate or an individual exception, for payment of wages below 50 percent of the minimum wage, *also* must be filed with the state vocational rehabilitation agency. The state agency must certify that: (1) the evaluation and training program meets the above definition, or (2) the person for whom an individual exception is being requested has an earning capacity

which is so severely impaired that he or she is unable to earn 50 percent of the minimum wage. Temporary certificates are authorized in cases where an institution does not have the information called for in the application.

Criteria for Consideration in Issuance of Certificates. The Administrator will use the following criteria in determining the need for issuance of a subminimum wage certificate:

The present and previous earnings of the patient workers;

Whether the patient workers are receiving commensurate pay;

The nature and extent of the patient workers' disabilities and the degree to which these factors affect their earning or productive capacity;

Whether the conditions of the certificate have been met; and

Whether certification by the state agency has been received.

Issuance of Certificates. The institution must be notified of the Department's action on an application for a certificate. Group wage certificates may be issued for an entire institution or a department or section of an institution.

Terms and Conditions of Certificates. A certificate will specify the terms and conditions under which it is granted, the effective period (usually one year) and will apply to every worker in the certified program.

Patient workers must receive time and one-half for any overtime (beyond the maximum workweek specified in the Act) and may not be newly employed when abnormal labor conditions exist (strikes, lockouts, etc.). In addition, each patient worker and his parent or guardian must be informed promptly, both orally and in writing, of the minimum wage applicable to him and of the terms of the certificate.

The terms of any certificate may be amended for cause upon the request of the institution, the patient worker, or his parent or guardian, or upon the initiative of the Labor Department.

Renewal of Certificates. An existing certificate shall remain in effect until an application for renewal has been approved or denied, provided the renewal application has been filed in a timely fashion. Patient workers may be paid less than the minimum wage pending final action on an appeal, provided that, if the application denial is upheld on review, the institution will be responsible for paying the individual back wages.

Records. The institution will be responsible for maintaining the fol-

lowing records:

The nature of the disabilities of patient workers;

The productivity of each patient worker;

The production standards for any average non-handicapped workers performing tasks similar to a patient worker in the hospital or institution;

The prevailing wages for non-handicapped institutional workers or workers in nearby industry;

The names and time periods patient workers are covered under an evaluation and training certificate;

Indication of which workers are covered under a group minimum wage certificate and/or work activities center certificate;

Indication of patient workers for whom individual exceptions have been authorized;

All additional records required under other Department of Labor regulations.

Posters must be on display at all times informing patient workers of their rights under the Fair Labor Standards Act.

Cancellation of a Certificate. The Labor Department may cancel any certificate for cause. Such cancellations are effective: (1) as of the date of issuance in the case of fraud; (2) as of the date of the violation in the case of a violation, and; (3) as of the date of notification if the certificate is no longer found to be necessary. Institutions are granted appeal rights and will receive proper notification.

Review. The Wage and Hour Division of the Labor Department, in cooperation with the Advisory Committee on Sheltered Workshops, is required to review the administration and enforcement of the February 7 regulations in approximately six months. In addition, an appeals procedure is included for any aggrieved party.

Submission of Information, Investigations and Hearings. The Labor Department is authorized to request any additional information which may be needed, conduct investigations and hold hearings.

Issuance of Experimental Certificates. The Labor Department is authorized to issue certificates to permit the employment of patient workers as part of experimental programs to increase the employment opportunities for such persons.

Amendments. The Labor Department is permitted to amend these regulations at any time, provided proper notice is given and interested parties are offered an opportunity to present their views.

2. Public Service Employment

On January 10, 1975 the U.S. Department of Labor released regulations activating a new program to alleviate the burgeoning nation-wide unemployment problem by authorizing funds to create thousands of public service jobs (40 CFR 2359). Authorized under 1974 amendments to the Comprehensive Employment and Training Act, the primary purpose of this new Title VI program was to lower the then rapidly escalating rate of unemployment among American workers.

Among the key provisions in the regulations were:

Prime Sponsor. A "prime sponsor" has responsibility for the total management of CETA manpower programs, including planning, operation and evaluation. Only prime sponsors can apply for CETA funds, including Title VI aid. However, they, in turn, may contract with other agencies to carry out the actual manpower training and employment programs.

Generally, prime sponsors must be either: (1) units of local government (cities, counties, etc.) with a population of 100,000 or more; (2) combinations of local units, one of which has a population of 100,000 or more, called a consortia; (3) entire states; or (4) a state serving the balance of its territory not included in any local prime sponsor's area.

State prime sponsors have the additional responsibility of coordinating all manpower and manpower related services in the state and establishing a Manpower Services Council to review and monitor developments within the entire state.

Allocation of Federal Funds. Fifty percent is distributed on the basis of the relative number of unemployed persons in the prime sponsor's area; 25 percent of the funds are doled out on the basis of the relative number of unemployed persons in areas with unemployment rates of 4.5 percent and above; and 25 percent is allocated among areas with an unemployment rate of 6.5 percent or above.

Limitations on Support. Federal funds may not be used to employ a worker in a public service job for over 13 months. In addition, a federal ceiling of $10,000 is set for public service job holders under the program. The overall goal is to effect a nationwide federally supported average annual salary of $7,800 per full time position.

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On December 1, 1976 the Department of Labor issued final regulations (41 CFR 54065) implementing the "Emergency Jobs Program Extension Act of 1976" (P.L. 94-444). Included are revised regulations governing the operation of the Public Service Employment and Training

program, originally authorized under Title VI of the Comprehensive Employment and Training Act.

Among the key statutory amendments which are reflected in the December 10 rules are:

A shift in emphasis toward serving persons who are long-term unemployed or AFDC recipients and whose family incomes are 70 percent or less of the lower living standards, as determined by the Bureau of Labor Statistics. The intent is to provide the level of funding necessary to sustain Title VI through FY 1977;

Long-term unemployed persons and AFDC recipients must constitute at least 50 percent of those hired by any Title VI project. Labor Department estimates indicate that the funds thus far appropriated by Congress will be sufficient to maintain only the present number of public service jobs. Therefore, the new regulations include a simplified method by which prime sponsors can calculate the number of long term unemployed and AFDC recipients hired;

New projects and activities must be limited to one year in duration. While there is no regulatory limit on the duration of an enrollee's participation, the Labor Department is strongly recommending that prime sponsors restrict participation to one year;

Project work must be above and beyond those services customarily provided by state and local jurisdictions and, at the same time, similar to work performed by regular employees in order to insure that prevailing wages are paid.

Public agencies in a number of states have used Title VI funds over the past few years both to provide job opportunities for unemployed handicapped workers and to hire therapy and classroom aides to serve severely disabled children and adults.

3. Public Works Employment

Final regulations implementing Title I of the Public Works Employment Act of 1976 (P.L. 94-369) were issued by the Economic Development Administration on August 23, 1976 (41 CFR 35669). These regulations which are designed to provide immediate economic stimulus to geographic areas of the country experiencing severe unemployment, place a general limitation of $5 million on the federal share of any Title I project. Exceptions to this rule, however, may be approved "for good cause" by the Assistant Secretary of Commerce for Economic Development. A total of $2 billion was appropriated by Congress for Title I projects during fiscal year 1977.

Within each state potential projects must be ranked in priority order,

using the following weighted formula: (1) the relative number of unemployed workers in the project area (30%); (b) the relative severity and duration of unemployment in the area (25%); and (c) the cost per person-month of employment (25%). Other factors which can be taken into consideration include: (a) the project's potential for offering long term benefits (10%); (b) sponsorship by a general purpose unit of local government (5%); and (c) the relationship of the project to plans for local or regional development.

Several states and local jurisdictions have used Title I funds to construct public service facilities for handicapped children and adults.

Title II of the Public Works Employment Act authorizes a program of financial assistance to state and local governments to combat the effects of the 1975-76 economic recession. A total of $125 million is authorized for each quarter in which the national, seasonably adjusted unemployment rate reaches 6 percent. An additional $62.5 million is authorized for each one-half percentage point above six percent.

These funds are distributed to state and local governments in accordance with the general revenue sharing formula, with one-third reserved for the states and two-thirds for local governments. Of the $1.25 billion appropriated for Title II grants, $312.5 million is earmarked for the quarter ending September 30, 1976 and the remainder for FY 1977. Interim regulations implementing the Anti-Recession Fiscal Assistance program were issued by the Treasury Department on October 12, 1976 (41 CFR 44841).

4. Federal Contract Work

The Federal Committee for purchase from the Blind and Other Severely Handicapped on November 29, 1976 published proposed regulations (41 CFR 52323) which would terminate the current preferential treatment for services delivered by sheltered workshops for blind individuals. This change is in keeping with a provision of the Wagner-O'Day Amendments of 1971 (P.L. 92-28) which granted priority to blind workshops through December 31, 1976.

The original Wagner-O'Day Act, passed in 1938, provided special preference in bidding on government contracts to workshops for other severely handicapped individuals as well. However, P.L. 92-28 specified that blind workshops would be granted preference in the production of commodities and, in addition, would receive priority in the provision of contractual services to government agencies through December 31, 1976. The new regulations would simply eliminate the service priority, effective January 1, 1977.

In addition, the November 29 rules would: (a) clarify the responsibilities of procuring agencies which authorize other agencies to purchase items included on the annual Procurement List published by the Committee; (b) require Committee approval before a Central Non-Profit Agency could enter into a contract with the government to furnish commodities or services under P.L. 92-28; (c) clarify the Committee's authority to grant purchase exceptions; and (d) make it clear that the Committee has final authority to resolve disputes between Central Non-Profit Agencies and the procuring agencies.

The 14-member Committee, which consists of representatives from eleven federal agencies and three public members, is responsible for selecting and publishing an annual list of products and services which may be produced or provided by workshops and for determining the fair market price of such commodities and services. The task of obtaining government contracts and allocating the work among participating sheltered workshops is assigned to the Central Non-Profit Agencies. Currently, two Central Non-Profit Agencies are recognized under the Committee's regulations - the National Industries for the Blind and the National Industries for the Severely Handicapped.

Earlier in the year the Committee had published regulations transferring the Central Non-Profit Agency functions for all non-blind workshops to the National Industries for the Severely Handicapped, Inc. (41 CFR 26905). Previously this responsibility had rested with six national non-profit organizations for the handicapped which in 1974 banned together to form NISH.

RIGHTS

1. Anti-Discrimination Rules

On April 28, 1976 President Ford issued an executive order (Exec. Order 11914) directing all federal departments and agencies providing financial assistance to issue rules, regulations and directives barring discrimination against handicapped individuals.

Under the Presidential order, the Secretary of Health, Education, and Welfare is assigned responsibility for: (a) coordinating the implementation of the anti-discrimination programs of all federal agencies; (b) establishing government-wide standards for determining who will be considered handicapped and what constitutes discriminatory practices; and (c) providing assistance to all federal department and agencies in order to insure that consistent policies, practices and procedures are adopted.

The April 28 order makes it clear that all agencies are to take appropriate steps to suspend or terminate federal aid should efforts to obtain voluntary compliance with nondiscriminatory policies fail.

* * * * *

On July 16, 1976, HEW's Office of Civil Rights released proposed regulations (41 CFR 29548) designed to protect physically and mentally handicapped persons against discrimination in federally funded programs. The rules were intended to implement Section 504 of the Rehabilitation Act of 1973 which stipulates that "no otherwise handicapped individual . . . shall solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance".[8]

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[8]Final Section 504 regulations were issued by HEW on May 4, 1977. While the basic format and contents of the final regulations are quite similar to the July, 1976 version, numerous changes were made in the specific provisions as a result of written and oral comments received from over 700 respondents and testimony presented at twenty-two public meetings across the country.

The basic format of the proposed regulations is practically identical to the one used in draft rules which were published in the *Federal Register* on May 17, 1976 (41 CFR 20296).

The July 16 regulations are divided into six parts. The first three parts contain general provisions applicable to all recipients of federal assistance, while the latter three parts emphasize program areas in which discrimination is most frequently manifested. The following is a brief sketch of the major sections of the proposed rules:

Subpart A - contains general provisions affecting all recipients of assistance, including definitions of terms, a description of prohibited practices, remedial action, affirmative action and other procedural steps which must be taken to assure compliance.

The definition of the term "handicapped person" is interpreted to include drug addicts and alcoholics but to exclude homosexuals; however, OCR makes it clear that the bulk of its enforcement efforts will be focused on eliminating discrimination against severely handicapped persons.

One key change in the proposed regulations is found in the definition of the term "recipient." Because of numerous expressions of concern about the exclusion of Title XIX health providers from coverage in the May 17 draft rules, OCR modified the definition to include direct health service providers, rather than delegating compliance responsibility to the state Medicaid agency or the responsible intermediary agency.

Subpart B - prescribes the requirements for non-discrimination in the employment practices of federal grant recipients. An effort is made in this section to delineate the factors which OCR will consider in determining whether an accommodation necessary to permit a handicapped employee or applicant to perform a job would impose an undue hardship on the employer.

Subpart C - prohibits the exclusion of qualified persons from federally financed programs because of the inaccessibility or unuseability of a recipient's facilities. A recipient would be required under this section to conform new design and construction to the latest accessibility standards of the American National Standards Institute and to make certain alterations to comply with ANSI standards in existing facilities.

Subpart D - outlines the requirements for non-discrimination in preschool, elementary, secondary and adult education programs. This subpart generally conforms to the standards established for the education of handicapped persons under recent "right to education" law suits and the "Education for All Handicapped Children Act of 1975" (P.L. 94-142).

Subpart E - generally follows the Department's Title IX regulations in specifying requirements for non-discrimination in recruiting and admitting students to post secondary education programs as well as avoiding discriminatory treatment of students enrolled in such programs.

Subpart F - applied to recipients of HEW supported health, welfare and social services programs. No specific strategy for enforcing the regulations in the huge, multi-faceted health, welfare and social service sectors is included.

The appropriateness, safety and overall adequacy of care for persons institutionalized as a result of their handicaps is not covered under the proposed regulations. OCR officials concluded that the inclusion of such "right to treatment" provisions in the regulations would exceed the Secretary's rulemaking authority under Section 504.

2. Affirmative Action

Two and one-half years after the enactment of a statutory requirement that federal contractors and subcontractors adopt affirmative action plans for employing and advancing handicapped workers, the U. S. Department of Labor released final regulations implementing the law. The legal requirement, which is found in Section 503 of the Rehabilitation Act of 1973 (P.L. 93-112), is intended to protect handicapped persons against job-related discrimination.

The April 16, 1976 regulations closely parallel proposed rulemaking issued by the Department on August 29, 1975. Incorporated in the final rules are several key changes which were mandated by Congress in the Rehabilitation Act Amendments of 1974 (P.L. 93-516).

The following are among the most important changes in the April 16 regulations:

The definition of a handicapped individual has been revised to conform to P.L. 93-516. Under the definition, a handicap is any impairment which substantially limits one or more of a person's major life activities;

Definitions of the terms "major life activity" and "qualified handicapped individuals" are added to emphasize that the regulations are only applicable to persons who are qualified to work and have disabilities which are substantial barriers to employment;

Non-exempt individuals or agencies with federal contracts of $50,000 or more and 50 or more employees are required to prepare affirmative action plans. The dollar amount in the initial regulations (dated June, 1974) was $500,000.

The affirmative action policy section has been expanded to include a

more detailed explanation of what contractors are expected to do to fulfill their affirmative action obligations;

The certification procedure has been revised to coincide with the expanded definition of a handicapped individual. Complainants no longer have to be certified as handicapped by the state rehabilitation agency; instead, they simply have to sign a statement attesting to their disability. Contractors, however, may require applicants or employees to document their claims of disability and the Department may require complainants to obtain disability certificates;

A provision has been added specifying that sub-contractual arrangements with sheltered workshops may not be deemed to fulfill the contractor's affirmative action obligations unless the firm uses the sheltered workshop as a source of trainees for its own workforce.

3. Architectural Barriers

On December 20, 1976 the federal Architectural and Transportation Barriers Compliance Board published a final set of procedures for use in formal compliance hearings (41 CFR 55441).

Among the responsibilities assigned to the Board under the Rehabilitation Act Amendments of 1974 (P.L. 93-516) is to hold hearings and issue orders it deems necessary to ensure compliance with facilitiy standards issued under the Architectural Barriers Act of 1968 (P.L. 90-480). The 1974 legislation authorizes the Board to withhold or suspend federal funding in connection with any building found not to be in compliance with applicable architectural standards.

The new rules, which appeared in the December 20 issue of the *Federal Register,* outlines the process by which the Board will handle formal complaints of non-compliance. However, emphasis is placed on attempting to resolve complaints informally prior to scheduling a hearing.

VOCATIONAL REHABILITATION

1. Basic Program Regulations

HEW issued final regulations implementing the Rehabilitation Act Amendments of 1974 (P.L. 93-516), on November 25, 1975 (40 CFR 54696). These regulations also clarified certain regulatory provisions contained in final rules governing the Rehabilitation Act of 1973, which were published on December 5, 1974 (39 CFR 42469).

Organizationally, the regulations are divided into two sections. Part 1361 deals with the state vocational rehabilitation program, while Part 1362 covers a variety of project grants and other federally administered assistance authorized under the Rehabilitation Act.

Among the significant regulatory changes included in the November 25, 1975 rules are:

Persons found ineligible for vocational rehabilitation services must be provided with a review of their ineligibility within twelve months of the date on which services were denied.

Agencies receiving assistance under the Act must have affirmative action plans for the employment and advancement of qualified handicapped persons.

A rehabilitation client with a possible hearing disorder must be furnished an "evaluation of the auditory system" which may be performed only by a physician and, where appropriate, a "hearing evaluation" which may be performed either by a physician or a licensed or certified audiologist.

With the exception of the above changes and a variety of relatively minor revisions, the November 25, 1975 regulations are identical, in substance, to the December 5, 1974 rules. Nonetheless, the entire regulations are recodified in order to reflect the transfer of the Rehabilitation Services Administration from the Social and Rehabilitation Service to the Office of Human Development - a move mandated by Congress under the 1974 Amendments.

2. Evaluation Standards

On December 19, 1975 the Rehabilitation Services Administration published final standards for evaluating vocational rehabilitation programs and projects (40 CFR 58955).

The purpose of these standards is to establish criteria for evaluating program effectiveness, increasing program accountability and encouraging state vocational rehabilitation agencies to conduct more comprehensive evaluations of their programs.

A total of nine general standards for program evaluation are included in the regulations. These standards are grouped under three headings: persons served, program efficiency, and client outcomes. Subsumed under each of the nine standards are various data elements for use in evaluating the program or project. Performance levels for each standard are also included.

3. Vending Facilities for the Blind

Proposed regulations implementing the Randolph-Sheppard Amendments of 1974 (P.L. 94-516) were issued by the Rehabilitation Services Administration on December 23, 1975 (40 CFR 59407).

The state vocational rehabilitation agency for blind individuals is designated under the regulations to serve as the licensing agency for purposes of administering the state's vending facility program for the blind. The role of the state licensing agency in locating and operating vending facilities on federal property and distributing income from vending machines is also specified in the regulations.

The Secretary of Health, Education, and Welfare is authorized to appoint an ad hoc arbitration panel to settle any disputes arising between blind licensees and state licensing agencies. The regulations also require the provision of vocational and other training services to blind licensees.

A comprehensive set of rules governing the maintenance and operation of vending facilities on federal property are set forth in the regulations, including provisions regarding the assignment of priority to blind licensees, the designation of satisfactory sites, the operation of cafeterias by blind licensees, and the terms under which operating permits may be issued. As a general rule, blind vending facilities will not be located in buildings with less than 15,000 square feet of interior space or buildings housing fewer than 100 federal employees.

SOCIAL SECURITY AND SUPPLEMENTAL SECURITY INCOME

As usual, during 1975 and 1976 the Social Security Administration published a wide range of rules governing payments to the over 34 million Americans who are eligible for social security benefits and approximately five million SSI recipients. It is not possible in this brief review to cover all of the published policies which have general applicability to Social Security beneficiaries and SSI recipients. Therefore, only those rules with special relevance to disabled recipients and applicants will be reviewed in this report.

1. SSI Disability and Blindness Criteria

Subpart I of the SSI regulations was issued in final form on July 29, 1975 (40 CFR 31778). This section of the regulations contains many of the specialized policies dealing with determination of the eligibility of blind and disabled persons. In general, this section of the regulations: (1) defines the terms disabled and blind for purpose of SSI eligibility; (2) sets out requirements for enrolling former recipients of Aid to the Permanently and Totally Disabled into the new program; (3) outlines detailed criteria for determining disability or blindness; and (4) establishes evidentary requirements, policies for evaluating work activities as they relate to disability, and criteria for continuing disability evaluations.

Among the specific highlights of these regulations are provisions which:

defines a "physical or mental impairment" as "an impairment which results from anatomical, physiological or psychological abnormalities which are demonstrable by medically accepted clinical and laboratory diagnostic techniques." The regulations spell out in detail the procedures for determining and verifying the existence of such conditions as mental deficiency, cerebral palsy, epilepsy, and other neurological, physiological and mental disorders.

generally, the evaluation of a disability rests on a determination of the medical severity of the individual's handicap plus an evaluation

of the person's ability to engage in substantial gainful activity. This two prong test is almost identical to the one applied for many years in determining eligibility for disability benefits under Social Security.

in determining an individual's capacity to engage in substantial gainful activity, the nature of the work, the adequacy of the individual's performance, and the individual's earnings are to be taken into account. In general, average earnings of less than $130 a month is an indication that the individual is unable to engage in substantial gainful activity while earnings of over $200 a month are generally a sign that the individual is not sufficiently disabled to meet the SSI test. The range of $130 to $200 a month is considered a gray area where other factors surrounding the individuals's case must be taken into account. In the latter case, however, special consideration is given to employees in sheltered workshops or comparable facilities.

earnings of an SSI recipient may be disregarded for up to nine months if he is engaged in a period of "trial work."

2. Childhood Disability Criteria

Responding to a Congressional mandate, on December 3, 1976 (41 CFR 53042) the Social Security Administration issued proposed criteria for making SSI disability determinations among children under the age of 18. The amendments to existing SSI regulations were intended to implement Section 501(b) of P.L. 94-566 which directs SSA to issue childhood disability criteria within 120 days after enactment of the legislation (i.e., by February 17, 1977).[9]

The basic requirements for determining childhood disability in existing regulations are unchanged. A child under age 18 is considered to be disabled if: (a) he is unable to engage in substantial gainful activities; (b) his impairment(s) meets the durational requirements; and (c) his disabling condition is either a listed impairment or the medical equivalent of such an impairment.

Under previous regulations, a single list of impairments was applied to both children and adults. This section was retained in the proposed regulations. However, a new subdivison was added to deal with the evaluation of disabling conditions peculiar to childhood.

[9]Final childhood disability criteria was published by SSA in the Federal Register on March 16, 1977 (42 CFR 14705). Only minor changes were made in the proposed criteria as described here.

Among the most noteworthy features of the proposed criteria for determining childhood disability are the following:

children with an IQ of 59 or below would be considered disabled for SSI purposes regardless of whether other associated handicapping conditions existed or not. Although up until the present the adult standard (IQ of 49 or below) was the only published regulatory criteria, SSA, in the case of children under 18, has been using IQ 59 or below for some time;

children with an IQ of between 60-69 would either have to:

(a) have a physical or another mental impairment which restricts their functional or developmental progress; (b) have chromosomally-proven Down's syndrome in order to be found disabled;

youngsters, whose age and/or condition preclude formal intelligence testing, could be found disabled if they failed to achieve those developmental milestones generally acquired by children no more than one-half of their chronological age..

In order to be found disabled an epileptic child would have to have experienced at least one major motor seizure per month or at least one minor motor seizure per week despite at least three months of prescribed treatment. The frequency of major motor seizures could be reduced if the condition were combined with mental retardation, an emotional disorder, communication disorders, a visual defect or adverse effects of medication.

To be found disabled due to cerebral palsy, a child would have to be suffering from "persistent disorganization or deficit of motor function for age involving two extremities, which (despite prescribed therapy) interferes with age-appropriate major daily activites and results in disruption of time and gross movements, or gait and station." Less severe motor dysfunction (but more than a slight manifestation of the disorder) could be evidence of a disability if the child's cerebral palsy were combined with mental retardation, epileptic seizures, communication disorders, visual defects or a significant emotional disorder.

3. Gainful Activity Guidelines

On February 18, 1976 the Social Security Administration proposed that earnings guidelines, used to assess whether an SSI or Social Security beneficiary is engaged in substantial gainful activity, be increased (41 CFR 7415). At the same time, a new method was suggested for systematically adjusting these earnings guidelines, based on

the rate of increase in average taxable wages and salaries of covered employees.[10]

In the past few years the Social Security Administration has adjusted the so-called SGA test infrequently and, as a result, it has not reflected the increased earnings guidelines annually. Future revisions in the earnings guidelines would be based on the rate of increase in average taxable wages for the some 70.6 million employees covered by the Social Security system.

4. Unearned Income Rules

On October 20, 1975 the Social Security Administration issued proposed regulations which would implement a new, simplified method for treating support and/or maintenance furnished to SSI recipients living in various types of non-institutional housing (40 CFR 48937). Also included in the October 20 regulations were provisions implementing the so-called Church Amendment which stipulates that support and maintenance provided to an individual residing in a non-profit retirement home or a similar facility will be disregarded in determining the individual's eligibility for SSI benefits.

During the following month, SSA issued proposed regulations applying the same simplified method for determining the value of support and maintenance to recipients in non-medical institutions (40 CFR 54005).

Concurrent with the issuance of these two sets of regulations, SSA officials in Baltimore distributed administrative instructions to the field which would have had the effect of applying the new rules in such a manner that SSI payments on behalf of disabled recipients in foster homes and similar settings would have been automatically reduced by one third. After protests were raised by consumer and professional organizations representing the handicapped and key members of Congress, however, the Social Security Administration withdrew these operating instructions early in 1976.

5. Cost-of-Living Increase

During both 1975 and 1976 monthly benefit payments were increased for aged, blind, and disabled recipients of Social Security and Supplemental Security Income. The 1975 increase, averaging eight percent, went into effect in June of that year for Social Security beneficiaries and in July for SSI recipients. One year later benefit payments were increased by an additional 6.4 percent.

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[10]To date, final regulations have not been issued and informal reports indicate that SSA officials have tabled the idea of adjusting the SGA guidelines, at least for the time being.

Under an amendment enacted by Congress in 1973 (P.L. 93-66), Social Security and SSI recipients are entitled to automatic cost-of-living increases during any period in which the Consumer Price Index, as computed by the U.S. Department of Labor, exceeds three percent. The first cost-of-living computation quarter possible under the provisions of the 1973 amendment was the quarter ending March 31, 1975.

For single SSI recipients the two stage increase meant that the federal portion of assistance checks jumped from $146.00 to $167.80 monthly (or from $1,752.00 to $2,013.60 annually). For couples, monthly benefits increased from $219.00 to $251.80 a month (or from $2,628.00 to $3,021.60 on an annual basis).

6. Experimental Day Care

Proposed rules designed to implement experimental day care programs were published in the *Federal Register* on January 9, 1976, by the Social Security Administration (41 CFR 1603). The regulations would authorize the Secretary of Health, Education, and Welfare to establish the new program, in accordance with Section 402(a) of P.L. 90-248, as amended.

The experimental day care programs would be required to offer ambulatory care services to impaired adults capable of only marginal self care. Such care would have to be designed to serve as a transition from acute or long term health care to personal independence or to serve as a long term alternative to institutionalization in a skilled nursing home or other long term care facility.

In order to qualify for the program a day care center would have to offer at least the following services: (a) emergency services; (b) rehabilitation; (c) personal care; (d) nutrition; (e) social work; (f) patient activities; and (g) transportation. The services furnished are intended to meet the physical or mental deterioration that might otherwise require the individual to be institutionalized.

7. Vocational Factors in Disability Determinations

On November 22, 1976 the Social Security Administration announced its intention to publish rules for evaluating vocational factors, such as age, education and past work experience in determining whether applicants are eligible for disability benefits under the Social Security and Supplemental Security Income programs.

Under current law when a disability determination cannot be made on medical considerations alone and the individual is unable to return to his or her past work, SSA is required to take into account the person's ability to engage in other substantial gainful work. Over the years, SSA officials have developed criteria for evaluating these factors on the basis

of operating experience. However, these criteria have never been incorporated in SSA regulations.

A meeting of representatives of interested national organizations was held in Baltimore on December 8, 1976 to discuss the provisions of draft regulations developed by the Social Security Administration. In essence, these draft rules, which drew sharp criticism from handicapped and legal advocacy groups, would have set up a series of guides for considering such factors as age, level of education and exertional limitations. By the end of the year, SSA had not issued proposed regulations for evaluating vocational factors in the disability determination process.[11]

[11] Subsequently, SSA held a series of regional hearings to obtain public comments on the draft regulations; but, as of June, 1977, it was still not clear when, and in what form, regulations for evaluating vocational factors would be issued.

HOUSING

1. Elderly/Handicapped Housing Loans

During 1975 considerable controversy was aroused by regulations implementing Section 202 of the Housing Act of 1959, a special loan program for constructing housing serving elderly and handicapped persons. The purpose of these rules, proposed by the Department of Housing and Urban Development on May 15, 1975 (40 CFR 21040) and later issued in final form on August 20, 1975 (40 CFR 36535), was to specify the requirements and procedures for obtaining Section 202 loans, in accordance with statutory changes mandated by Congress in the Housing and Community Development Act of 1974 (P.L. 93-383).

The key issue in the controversy was whether Section 202 funds should be used for permanent loans to groups interested in constructing housing for the elderly or handicapped or tied to Section 8 (rent subsidy) financing. HUD opted for the latter strategy, arguing that, if long term financing of construction projects were handled through the rent subsidy program, Section 202 funds could be recycled approximately every two years rather than tying up the limit amount available in 30 to 40 year mortgages. Advocates for the elderly and handicapped, however, contended that most non-profit groups working with older Americans and disabled citizens would be unable to qualify for Section 8 financing because they lacked experience in building facilities and the capital assets necessary to qualify for conventional or FHA loans. They also pointed out that the Section 8 Fair Market Rents were not high enough to finance Section 202 projects since many of the projects require special staff. HUD officials responded to this latter argument by indicating that the Fair Market Rents for dwelling units designed for the elderly and handicapped (not to exceed two bedrooms) are five percent higher than the published rent ceilings for the area, which "should be sufficient to meet all project expenses, including special staffing or administrative requirements."

Eventually Congress settled the argument by including language in the FY 1976 HUD-Independent Agencies Appropriations Act which directs the Department to use Section 202 loan authority exclusively for long term financing of housing projects for the elderly and handicapped. In

addition, the Act lowers the minimum capital investment requirement for Section 202 loans to 0.5 percent of the mortgage amount, not to exceed $10,000.

Late in the year, in response to this Congressional initiative, HUD issued new, proposed regulations governing construction loans for housing handicapped and elderly persons. The process of obtaining a Section 202 loan, as outlined in the November 25, 1975 regulations (40 CFR 54735), is as follows:

The HUD central office will make a geographic allocation of available Section 202 funds among the ten HUD regional offices;

The central office then will issue invitations to private non-profit applicants to participate in the program;

Based on preliminary information submitted by potential applicants, a central office evaluation committee will rank each non-profit applicant in terms of its capacity and experience.

Section 202 funds will be reserved for successful applicants pending approval of Section 8 assistance proposals by the appropriate HUD Field Office;

Once the Section 202 proposal is approved and the applicant/borrower has obtained a commitment for permanent financing, disbursement of Section 202 loan funds may commence.

"Seed money" loans are also authorized to assist groups interested in developing a housing project for the elderly or handicapped. HUD will cover up to 80 percent of the pre-construction costs under such loans.

* * * * *

The February 25, 1976 issue of the *Federal Register* (41 CFR 8313) contained final regulations governing federal loans for constructing and rehabilitating housing for elderly and handicapped persons. These regulations were issued as proposed rulemaking on November 25, 1975, after Congress directed HUD officials to use the handicapped/elderly loan programs, authorized under Section 202 of the National Housing Act, exclusively for long term financing of housing projects.[12] Earlier HUD regulations have tied Section 202 loans to eligibility for Section 8 (rent subsidy) financing.

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[12]On January 31, 1977 HUD published an extensive set of revisions to the final elderly/handicapped housing regulations. These revised regulations: (a) decentralized authority for approving Section 202 loans to HUD field offices; (b) outlined a new procedure for processing 202 applications; and (c) specified more explicit project selection criteria (42 CFR 5924). Later in the year, however, HUD postponed indefinitely plans to decentralize authority to approve Section 202 loan applications (42 CFR 17716).

HUD rejected suggestions that public agencies be considered eligible applicants under the Section 202 program, saying the Department "does not consider that public agencies have a need for direct construction and long term financing as severe as that of private non-profit applicants."

While a number of technical and administrative amendments were made to the November 25 rules, these changes are unlikely to have a substantial impact on potential sponsors of federally financed housing projects for the handicapped.

2. Rural Housing Rent Subsidies

On August 13, 1976 the Secretaries of Agriculture and Housing and Urban Development signed a memorandum of understanding (41 CFR 34348) designed to coordinate the two agencies' efforts to improve housing for lower income families in rural areas. The memorandum delineates the responsibilities each agency will assume when rent subsidy payments under Section 8 of the United States Housing Act of 1937 are used to finance rural housing.

Under the terms of the agreement, HUD agrees to set aside sufficient Section 8 contract authority during the FY 1977 to finance the construction of 4,000 new units under Section 515 of the U.S. Housing Act of 1949, the rural rental housing program. During FY 1977 and subsequent fiscal years a minimum of 10,000 rental units will be financed annually under the program.

The Farmers Home Administration in the Agriculture Department is responsible for establishing criteria for granting Section 515 loans and certifying to HUD that the Contract Rent for a particular project is in line with existing Fair Market Rents for newly constructed Section 8 units in the area. FHA also must insure that the project meets HUD minimum property standards, equal opportunity requirements, environmental standards and prevailing construction wage rates.

HUD, in turn, is responsible for processing Section 8 rental assistance requests, preparing Housing Assistance Payment Contracts and insuring that owners/developers comply with the terms of such contracts.

The memorandum of agreement also calls for the establishment of an inter-departmental task force to review the operation of the joint program and recommend solutions to any problems which arise. In addition, provision is made for interdepartmental training which may be necessary to implement an effective combination of the Section 8 and Section 515 programs.

In a related development, on October 27, 1976 HUD released interim regulations (41 CFR 47168) establishing policies and procedures for Section 8 projects financed under Section 515 of the Housing Act of

1949. The policies and procedures were intended to implement the August 13 memorandum of understanding between the Departments of Agriculture and Housing and Urban Development.

3. Community Development Block Grants

On January 19, 1976 the Department of Housing and Urban Development issued proposed rules which would have prohibited local communities from using HUD block grant funds to build or rehabilitate community-wide service facilities, including social service centers, sheltered workshops, group homes and half-way houses. The new provisions were contained in revised regulations (41 CFR 2765) implementing the Department's Community Development Block Grant program, which is authorized under Title I of the Housing and Community Development Act of 1974 (P.L. 93-383).

On October 4, 1976, however, interim regulations were published (41 CFR 43887) which added "centers for the handicapped" to the list of publicly owned facilities eligible for assistance under the Community Development Block Grant Program. This reversal in Departmental policy was triggered by the inclusion of an amendment in the Housing Authorization Act of 1976 (P.L. 94-375) which explicitly permits CDBG funds to be used to develop centers for the handicapped.

The primary goal of the Community Development Block Grant Program is the creation of viable urban communities, including decent housing, a suitable living environment and expanded opportunities, principally for persons with low and moderate income. Federal funds are allocated to metropolitan and non-metropolitan areas on the basis of a formula which takes into account population, the extent of poverty, and the extent of housing overcrowding. Eighty percent of appropriated funds, excluding the Secretary's discretionary funds, are allocated to metropolitan areas (communities with a population of 50,000 or greater in the most recent national census). The remaining 20 percent is reserved for non-metropolitan areas. A total of $3.15 billion was appropriated by Congress for grants under Title I during FY 1976.

No definitions of the terms "centers for the handicapped" or "handicapped" were included in the interim regulations. However, in soliciting comments on the rules, the Department requested input on whether

such definitions should be included and, if so, how encompassing the definitions should be.[13]

[13]Final regulations defining "centers for the handicapped" and describing eligible center activities were published in the April 18, 1977 issue of the *Federal Register* (42 CFR 20250). The term "centers for the handicapped" is defined in the regulations as "any single or multi-purpose facility which seeks to assist persons with physical, mental, developmental and/or emotional impairments to become more functional members of the community by providing programs or services which may include, but are not limited to, recreation, education, health care, social development, independent living, physical rehabilitation and vocation rehabilitation; but excluding any facility, the primary function of which is, to provide residential care on a 24 hour basis (such as a group home or halfway house). An example of a single purpose center, which is eligible for CDBG funding, would be a sheltered workshop for the handicapped.

CHILD NUTRITION

1. School Lunch Program

The Department of Agriculture released final rules governing the eligibility of residential child care facilities for benefits under the National School Lunch Program on May 4, 1976 (41 CFR 18426). These regulations were intended to implement legislation enacted in 1975 by Congress.

Under the 1975 amendments (P.L. 94-105) the benefits of the School Lunch and School Breakfast programs were extended to children living in public and licensed non-profit facilities providing residential services, including residential facilities for the mentally retarded and other handicapped children. Prior to the enactment of this legislation, such facilities were only eligible to participate in the commodity distribution program.

The May 4 regulations specify that the state education agency is responsible for administering the School Lunch program in residential child care facilities; however, if the state education agency cannot administer the program in such facilities, the Governor may designate another agency to perform this function. If a state agency is not permitted by law to disburse school lunch funds to private, non-profit schools, then this task is handled by the regional office of the federal Food and Nutrition Service.

Under the School Lunch and School Breakfast programs, qualified residential facilities are reimbursed for a portion of the cost of all morning and noonday meals served to eligible children. State agencies responsible for administering the School Lunch and School Breakfast programs are responsible for determining the subsidy rates in particular residential facilities which are eligible to participate in the programs. Factors taken into consideration in establishing a facility's subsidy rate include: the cost of producing meals and the amount of revenue currently available for food preparation and distribution. Subsidies are calculated on the basis of actual costs incurred under new, comprehensive cost accounting guidelines.

The state agency is also responsible for determining the number of children eligible for free and reduced price meals. This determination is made on the basis of family size and income in accordance with criteria established by the Department's Food and Nutrition Service. Under P.L. 94-105, children from families with income of no more than 95 percent above the poverty income guidelines are entitled to reduced priced meals.

Any facility participating in the School Lunch and School Breakfast program is also entitled to receive special milk benefits and commodity distributions. Most eligible residential facilities qualify as non-pricing institutions and, therefore, receive a special milk reimbursement of 6 cents per day per child. The value of the direct commodities received by the facility may total 12 cents for every lunch served. States may elect to receive a cash reimbursement in lieu of commodities but this option is not open to the individual facility.

The residential facility need not operate a school (or have the word "school" in its title) in order to qualify. Private, non-profit facilities, including group homes and similar facilities serving children, are eligible to participate in the program even though they don't have a state "license" per se - as long as they are in compliance with state operating standards.

2. Summer Food Service Program

Final regulations governing the Summer Food Service Program for Children were published in the March 5, 1976 issue of the *Federal Register* (41 CFR 9533).

The following summary highlights some of the major features of the regulations:

Administration. The Summer Food Service Program is administered at the national level by the Food and Nutrition Service of the U.S. Department of Agriculture. Within the states, the program is administered either by: (a) the state education agency; (b) another agency designated by the Governor; or (c) the appropriate regional office of the Food and Nutrition Service.

Program Eligibility. The program is available to any non-residential public or non-profit institution or a public or non-profit residential summer camp which serves meals to children from areas where poor economic conditions exist (i.e., at least one-third of the children must be eligible for free and reduced price school meals under the National School Lunch program and the School Breakfast program). Similarly, at least one-third of the children attending a public or non-profit residential summer camp must be eligible for free or reduced price meals.

Operating Criteria. To qualify for assistance a service institution or sponsoring agency must submit an application which includes information on management of the program, maintenance of food service records and proof of tax exempt status.

Late in the year the Food and Nutrition Service issued proposed amendments to the Summer Food Service Program regulations (41 CFR 55539). The basic purposes of these amendments was to clarify eligibility determination procedures, improve administrative controls, place a limitation on the number of food service sites operated by any one sponsoring agency and eliminate start-up grants.[14]

3. School Breakfast Program

On August 17, 1976 the U.S. Department of Agriculture issued final rules governing the School Breakfast Program (41 CFR 34757). The provisions of the regulations, which implement statutory changes contained in the 1975 legislation (P.L. 94-105), closely parallel the School Lunch rules.

Under P.L. 94-105, the benefits of the School Breakfast program are extended to children living in public and licensed non-profit facilities providing residential services, including residential institutions for the mentally retarded and other handicapped children. Under the August 17 regulations, any public or non-profit facility is eligible to participate in the program providing it: (a) maintains children in residence; (b) operates principally for the care of children; and (c) if private, is licensed under the appropriate state or local code to provide residential child care services. The term "child care institution" includes, but is not limited to: "homes for the mentally retarded, the emotionally disturbed, the physically handicapped, and unmarried mothers and their infants; group homes; halfway houses, orphanages; temporary shelters for abused children and for runaway children; long-term care facilities for chronically ill children; and juvenile detention centers."

The remainder of the regulations spell out administrative procedures, payment methods and the minimum essential nutritional requirements for meals served to qualified children.

4. Non-Food Assistance Program

The U.S. Department of Agriculture released final regulations (41 CFR 35686) governing the Non-Food Assistance Program, a program designed to assist states in supplying schools with equipment to store,

[14] On March 1, 1977 the final, revised version of these regulations was published in the *Federal Register* (42 CFR 11811) - among the most important changes was the restoration of federal start-up grants.

prepare, transport and serve food, on August 24, 1976.[15] Once again, the purpose of these regulations was to implement the provisions of P.L. 94-105.

Among the major revisions in the regulations are the following:

Eligibility for assistance is extended to public and private, non-profit child care institutions, including both residential and non-residential facilities;

Eligible schools may be declared "especially needy" and, thereby, qualify for 100 percent federal assistance. Normally, the designated state agency (or a non-profit school) is required to provide at least 25 percent in matching funds;

The portion of funds reserved for schools without a food services program is reduced from 50 percent to 33 1/3 percent;

After June 30, 1976, one-third of the appropriated funds are to be apportioned among the states on the basis of the relative number of children in schools without a food assistance program or without facilities to prepare or receive hot meals.

5. Special Milk Program

Regulations governing the Special Milk Program for Children were amended to implement P.L. 94-105 on July 27, 1976 (41 CFR 31172).

P.L. 94-105 amended section 3 of the Child Nutrition Act of 1966 to make Puerto Rico, the Virgin Islands, American Samoa, and the Trust Territory of the Pacific Islands eligible for the Special Milk Program.

6. Child Care Food Program

On June 25, 1976 final regulations implementing the Child Care Food Program were issued (41 CFR 26179) by the U.S. Department of Agriculture.

The statutory purpose of the programs is to assist the states in initiating, maintaining and expanding non-profit food service programs for children in nonresidential institutions which provide child care.

Any public or non-profit facility providing day care services to children, who are not maintained in permanent residence, is eligible to participate in the Child Care Food Program, including day care centers, settlement houses, Head Start centers, family day care programs, recreation centers and "institutions providing day care services for handicapped children." In order to qualify, however, a child care center must be

[15] Earlier in the year proposed rulemaking had been issued by the Department of Agriculture (41 CFR 35686).

either licensed by an appropriate federal, state or local agency or meet federal interagency day care requirements.

State agencies are reimbursed under the Child Care Food Program based on the number of meals served by type (breakfasts, lunches, suppers and supplemental food) and need category (free, reduced price, and paid) multiplied by the national average payment factor. Participating facilities must submit information on the number of enrolled children in each need category to the designated state agency. This information is used to assign a claiming percentage for each meal served.

Reimbursements may not exceed the lesser of: (a) food service operating costs less case income; or (b) an amount equal to the number of meals served times the assigned reimbursement rates. The state agency may assign varying rates to reflect the relative needs of facilities.

7. Special Supplemental Food Programs for Women, Infants and Children

On January 12, 1976 the Department of Agriculture issued rules governing the Special Supplemental Food Program for Women, Infants and Children (41 CFR 8647). In addition to incorporating statutory amendments centered in P.L. 94-105, the interim regulations carried out the requirements of a Federal Management Circular prescribing uniform administrative provisions for federal grants-in-aid to state and local governments.

Among the key changes, included in the January 12 regulations were an increase in the allowance for administrative expenses and expansion of program benefits to: (a) children under five years of age; (b) women for a post partum period of six months (or up to one year in the case of lactating women who are breast feeding an infant).[16]

[16] Proposed revisions to the so-called WIC program regulations were published on February 11, 1977 (42 CFR 8647).

TRANSPORTATION

On February 26, 1975 the Urban Mass Transportation Administration in the U.S. Department of Transportation released proposed regulations (40 CFR 8314) to codify existing rules and establish new requirements related to transportation services for the elderly and the handicapped. The new regulations would have required all UMTA grantees to include specific plans for meeting the transportation needs of the elderly and handicapped in their five year improvement programs and to request funds for implementing parts of such plans after October 1, 1976.

Among the specific elements to be included in all transportation improvement programs and plans after October 1, 1976 would be:

an identification of the elderly and handicapped persons within the urbanized area and their patterns of utilizing public transportation;

a description of the public and private resources presently devoted to meeting the transportation needs of elderly and handicapped persons in the area;

a description of how public transportation systems are being used to meet the transportation needs of target populations and, if not all needs are being met by available services, an explanation of the nature and reasons for the deficiencies;

a description of the alternative service improvements available to meet the transportation needs of the elderly and handicapped and the justification for selecting a particular alternative.

After October 1, 1976, each capital grant application submitted to UMTA would have to include specific requests for funding parts of the program plans for the elderly and handicapped or indicate when such requests would be forthcoming. Prior to 1976, grantees would have to include assurances in their applications that plans were being developed to meet the needs of the elderly and handicapped.

The February 26 rules also contained detailed specifications which fixed facilities and transit vehicles would have to meet in order to receive UMTA funds. The basic intent of these provisions was to make

mass transportation more accessible to physically handicapped and aged individuals.

The purpose of the proposed regulations was to implement Section 16(a) of the Urban Mass Transportation Act of 1964 and Section 165(b) of the Federal-Aid Highway Act of 1973. Section 16(a) states that elderly and handicapped persons have the same right as other persons to use mass transportation services and directs that special efforts be made to plan and design transportation systems which can be used by older and disabled citizens. Section 165(b) extends this mandate to mass transportation projects funded under the Federal-Aid Highway program.

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The U.S. Department of Transportation issued final regulations (41 CFR 18233) and advisory information related to transportation services for the elderly and handicapped on April 30, 1976.

Under the April 30 regulations all applicants for federal urban mass transit funds are required to: (a) demonstrate "satisfactory special efforts" in planning public mass transportation facilities and services which can be utilized by elderly and handicapped persons; and (b) include in all transportation improvement plans, submitted after September 30, 1976, projects or project elements designed to benefit elderly and handicapped individuals, including wheelchair users and semi-ambulatory persons.

Many of the specific planning requirements which were included in the proposed DOT rules dated February 26, 1975, were deleted from the final version of the regulations. These provisions were eliminated because state and local transportation officials expressed the fear that the cost of carrying out intricate planning requirements would exceed the federal resources available for such activities. In addition, some consumer groups representing the handicapped were concerned that a highly detailed planning process would cause inordinate delays in the initiation of needed transportation services.

Also included in the April 30 issue of the *Federal Register* are final rules establishing the minimum specifications which fixed facilities and transit vehicles must meet in order to receive funds from the Urban Mass Transportation Administration. The basic intent is to make regular transit services more accessible to the large number of ambulatory elderly and handicapped persons. In addition, a major goal of these regulations and companion planning and programming guidelines is to significantly increase the level of service for wheelchair users and other persons who are unable to negotiate steps.

Regional hearings held in 1975 by the Department and voluminous written communications indicated substantial disagreement concerning the best type of service for wheelchair users - accessible fixed route service, subscription service, subsidized shared-ride taxi service, or some combinations of these and other services. Therefore, UMTA officials have determined that services ought to be tailored to the needs of wheelchair users in the particular local areas. In view of the need to measure the efforts of local transportation officials, however, UMTA has issued guidelines which include specific, quantitative measures of satisfactory local effort.

Many of the precise equipment specifications which were included in the proposed 1975 regulations were eliminated from the final rules - either because UMTA officials determined that the particular requirement was beyond the current state of the art in equipment design or of only marginal value to elderly and handicapped users of transit facilities.

The term "elderly and handicapped persons" is defined in the April 30 regulations as "those individuals who, by reason of illness, injury, age, congenital malfunction, or other permanent or temporary incapacity or disability, including those who are non-ambulatory wheelchair-bound and those with semi-ambulatory capabilities, are unable without special facilities or special planning or design to utilize transportation facilities and services as effectively as persons who are not so affected."

DEVELOPMENTAL DISABILITIES

On August 30, 1976 the Department of Health, Education and Welfare released proposed rules (41 CFR 36581) to implement recent statutory changes in the Developmental Disabilities Act (P.L. 94-103). For the most part these tentative regulations closely parallel the language of the 1975 amendments to the Act.

The August 30 regulations are divided into three parts. Part 1385 brings together various general provisions which are applicable to other parts of the regulations. Provisions governing the conduct of the formula grant program are contained in Part 1386, while Part 1387 covers discretionary grant programs, including assistance to university affiliated facilities and special project grants.

General Provisions. Definitions of terms, a statement of the purposes of the Act and provisions related to judicial review, state control and employment of handicapped individuals are all contained in Section 1385.

Formula Grant Programs. This section of the regulations is divided into four subparts. Subpart A includes provisions related to the submittal of state plans. Under the proposed regulations, federal financial participation would be discontinued during any period of time in which a state does not have an approved state plan. This provision is intended to discourage the practice of failing to submit a state plan until a significant portion of the fiscal year has elapsed.

The formula for allotting grant funds among the states remains unchanged (one-third based on need; two-thirds based on population weighed by per capita income). The determination of a state's need for federal assistance is based on the relative proportion of recipients of adult disabled child benefits, authorized under Title II of the Social Security Act, residing in the state.

Subpart B spells out the composition, duties and responsibilities of the state planning council. Supervising the development of the state

plan is among the new statutory duties of the council. However, the day-to-day administration of the state plan, including the preparation of a "design for implementation," is the responsibility of the designated state agency. The activities of the designated agency are to be monitored by the state council to insure that the plan's goals and objectives are being achieved.

Specifications for implementing a new formula grant program to assist states in establishing protection and advocacy systems are contained in Subpart C. The proposed language closely follows the provisions of Section 113 of P.L. 94-103. No restrictions are placed on the choice of the agency responsible for planning the advocacy system, which every state must have in operation by October 1, 1977. However, strict limits are placed on the selection of an agency to operate the advocacy system in order to avoid conflicts of interest.

Subpart D outlines the hearing procedures to be followed in cases where states either fail to implement their own plans or are found out of compliance with federal regulations. The purpose of this Section is to promulgate procedures for initiating and holding fair hearings before any controversies arise.

Discretionary Grant Programs. Subpart A of Section 1387 contains rules governing the award of construction and demonstration and training grants to university affiliated facilities for the developmentally disabled. Most of the regulatory provisions in this subpart are simply restatements of language contained in P.L. 94-103; however, the contents of demonstration and training grant applications are specified.

Subpart B outlines the purposes for which special project grants may be awarded under Section 145 of the Act, as amended. Eligible applicants are limited to public and other non-profit agencies and organizations.

Copies of all applications for a special project grant (except projects of national significance) must be submitted to the state planning council for review and comment in order to insure that the proposed project is consistent with the goals and objectives of the state's developmental disabilities plan.

MISCELLANEOUS

1. Foster Grandparent Program

The ACTION agency published final Foster Grandparent Program regulations on September 4, 1975 (40 CFR 40805).

Perhaps the most important change in the regulations was the inclusion of authority to continue serving children up to age 21 "in exceptional cases." Previously, foster grandparents were restricted to working with children age 17 or under, with preference given to young children. The amendment allowed a foster grandparent to continue serving a needy child through age 20 if: (1) it has been professionally determined that the child is likely to improve in the areas of personal adjustment, social relationships, learning ability, and/or motor coordination; and (2) if a plan has been developed for serving the individual after he or she reaches 21 years of age.

Later in the year, Congress criticized ACTION for its rigid interpretation of the maximum age limit and directed the agency to revise its policies and permit foster grandparents to continue serving eligible "grandchildren" after they reach the age of 21. The directive is part of the Older Americans Amendments of 1975 (P.L. 94-135).

Other significant changes included in the September 4 regulations are:

A provision authorizing the approval of grants covering more than 90 percent of the costs of a FGP projects under certain exceptional circumstances;

Modification in the original one-to-one concept of the program to permit a foster grandparent to serve more than one child, provided the focus remains on maximizing the gains to children from a supportive person-to-person relationship with a mature adult;

Authority for foster grandparents to be used in schools, day care and pre-school establishments and private residences when referred there by public and private agencies called "volunteer stations."

2. Hearing Aids

In response to the growing national concern about unfair and deceptive practices in the hearing aid industry, on June 24, 1975, the Federal Trade Commission issued rules governing the advertising, promotion, sale, marketing and distribution of hearing aids (40 CFR 26645).

Disclosure requirements for television, radio, and print advertisements are included in the June 24 regulations. Buyers of hearing aids are also granted rights to cancel sale contracts within thirty days.

In addition, the regulations outline prohibited selling techniques and representations and advertising activities.

3. Regulatory Reform

Late in the year HEW Secretary David Mathews announced a proposed procedure which would permit waivers to be granted to state and local governments, public education agencies and private, non-profit service providers when a particular Departmental rule interfered with the coordination or integration of human services. The new waiver procedure was contained in proposed regulations which appeared in the December 6, 1976 issue of the *Federal Register* (41 CFR 53412).

The waiver proposal was the Department's second major step in an effort to reform the regulatory process. In late July, 1976, Secretary Mathews instituted new procedures for increasing citizen participation in the development of HEW regulations.

The December 6 regulations spell out a process whereby certain public and non-profit agencies can request waivers of specific Departmental requirements. The applicant for the waiver, however, would have to demonstrate that the federal requirement prevents or substantially impedes its efforts to achieve:

> the integration, coordination or linking of human service programs which receive, or are eligible to receive, funding under *two or more* HEW financial assistance authorities; and
>
> one or more of the following objectives: (a) integrated budgeting, planning or evaluation of human services; (b) joint funding of human services; (c) consolidated central administrative support; (d) physical consolidation of previously separate human services at a common site; (e) joint intake, screening, and eligibility determination for potential human service clients; (f) joint information and referral systems; (g) joint activities to inform potential human service clients and recipients of available services; (h) coordinated transportation programs; (i) joint planning for the delivery of services; (j) integrated case management techniques, procedures, or systems; and (k) such

other coordinative or integrative techniques or procedures which have the effect of improving the efficiency or effectiveness of human service delivery.

Approval of the waiver must not result in the expenditure of federal funds for purposes other than those for which they were appropriated. In addition, the effect of the waiver must be consistent with the purposes of the authorizing statute and its accompanying legislative history.

Top elected officials of general purpose governments, chief state and local education officials and private, non-profit agencies which are funded directly by HEW would be eligible to apply for the new waivers.

The Governor would have to approve all waiver requests submitted by local governments, public school officials and non-profit organizations if the request related to a state administered or supported program.

Only regulatory requirements established by HEW would be waivable. Provisions of federal law and regulations issued by other federal agencies would not be covered by the December 6 regulations. In addition, the Department's discretionary grant programs and Social Security, SSI and Medicaid benefits would be exempted from the proposed procedure.

4. Lead-Based Paint

On August 10, 1976 the Consumer Product Safety Commission proposed rules (41 CFR 33637) which would ban hazardous products: (a) covered with lead-based paint containing more than a safe level of lead; (b) toys or other articles intended for use by children which are covered by paint with an excessive amount of lead; and (c) articles of furniture bearing lead-based paint. In addition, in the August 10 notice (41 CFR 33636) the Commission also announced its intention to determine a safe level of lead, in accordance with the provisions of the Lead-Based Paint Poisoning Prevention Act, as amended.[17]

Later in the year the Commission postponed action on these two matters (41 CFR 44126) until April 1, 1977.

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[17]On February 16, 1977 the Commission formally announced its determination that the available scientific information is insufficient to establish that a level of lead in paint above 0.06 percent but not over 0.5 percent is safe. Action to ban hazardous products has again been postponed by the Commission through July 14, 1977.

Ingestion of lead can result in serious illness and severe disability (including mental retardation and emotional disorders), particularly among young children. Scientific studies have documented the fact that lead poisoning is a pervasive problem especially in deteriorating inner city neighborhoods.

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